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CONVEYANCER'S NOTEBOOK

EXTENSION OF LAND REGISTRATION

In the House of Commons on June 2, the Attorney-General stated that approximately a quarter of all conveyancing transactions are now registered at the Land Registry. It is hoped to extend the compulsory area to Manchester and Salford in the course of 1960, and it is intended to extend the compulsory area further as fast as the availability of up-to-date Ordnance Survey Maps and the recruitment and training of staff permit. Bearing in mind that new recruits to the profession are likely to be concerned more with registered than unregistered conveyancing it is to be hoped that the teaching schools, examining bodies and writers of students' conveyancing textbooks will steadily increase the attention given to the subject. It is not the function of this journal to advocate registered or unregistered conveyancing, but, so far as we are able, to expound the law and practice, for the principal opposition to registered conveyancing appears to come from those unfamiliar with the practice and fearful of the potential results of the lower scale remuneration. We beg to doubt whether the lower scale yields less profit for the work done, and building developers are becoming too familiar with the advantages of registered land to have their wishes ignored. There is, however, one serious complaint about remuneration and that is with regard to the minimum fee. Plots of land still often attract the minimum and the work involved may be considerable; the purchaser's solicitor may have to give far greater attention than usual to the planning position. Surely, ten guineas should today be the absolute minimum for any conveyancing transaction!

But our litigation friends may feel that their 6s. 8d. (plus 50 per cent.) per hour, still rigidly enforced by the taxing masters, makes even the minimum conveyancing fee affluence to them.

Effectiveness of a Pre-Emptive Rights Clause

We received some interesting correspondence arising out of Dr. Rice's article on this subject at p. 42, *ante*. The House of Lords decision ([1959] 3 W.L.R. 133) in *Lyle & Scott, Ltd.* v. *Scott's Trustees*, allowing the appeals from the Court of Session (1958 S.L.T. 169), has, however, overtaken the correspondence. Various shareholders agreed to sell their shares, authorised the use of their proxy and agreed to deliver up their share certificates and sign transfer deeds when called on in exchange for the price. It was argued for the shareholders that, as transfers to the purchasers had not been executed, they were not as yet " desirous " of transferring their shares so as to bring the pre-emptive rights article into operation. The House of Lords held that they had agreed to transfer their shares and were trustees of them for the purchaser and accordingly there was no room for doubt that they were desirous of transferring their shares. Articles are a business document and the House of Lords construed them in a broad sense. Anyone seeking to get round such an article as the one in question will have to show considerable ingenuity or simply persuade sufficient shareholders to compel the board of the company to accede to their desire.

Probate Practice—Applications by Post

Slowly the advantages of the postal service are making themselves felt even in connection with the administration of law. The time saved by the use of the post in the county courts is enormous and the Land Registry have now got to the stage when an experienced practitioner need never visit the building. We still have a long way to go in the High Court, but we must welcome the direction of May 29 ([1959] 1 W.L.R. 729). From July 1 applications to reseal Scottish confirmations and Northern Irish and Colonial grants may be made by post at the Principal Registry. This may be done by Scottish and Northern Irish solicitors direct. And solicitors applying for a second or subsequent grant where the original will is registered or the original grant made at the Principal Registry may apply at the Principal Registry by post. The post may be used even for first grants in the district registries. Is the difference a reflection on the Principal Probate Registry or London solicitors? And why is a correspondence fee charged?

Recent Legislation

Income Tax (Repayment of Post-War Credits) Act, 1959. This Act, which received the Royal Assent on April 30, provides that the Treasury may prescribe the classes who can receive repayment of post-war credits and the regulations, the Post-War Credit (Income Tax) Regulations, 1959 (No. 876), have been made. They came into force on June 1. The following qualify for repayment: men aged 63 or over and women aged 58 or over (there is equality for the sexes, except that, as in so many other things, the female is more equal than the male); personal representatives or beneficiaries of deceased credit-holders (if this means reopening numerous files of administration of estates, at any rate it prevents the further accumulation of unclosed estates); and certain cases of hardship where persons are blind or in receipt of National Assistance, constant attendant allowance or unemployability supplement. The forms for making claims have been available for some time.

Secondly, credits not repaid before November 1, 1959, will carry interest at 2½ per cent. per annum compound tax free, the interest to be repaid with the capital. Interest will cease two months after the month in which repayment could have been claimed.

Thirdly, provision is also made for the repayment of credits to building societies.

Housing (Underground Rooms) Act, 1959. It was held in *Critchell* v. *Lambeth Borough Council* [1957] 2 Q.B. 535 that fitness for habitation of an underground room was subject to the general provisions of what is now section 4 of the Housing Act, 1957. The new Act overrules this decision and provides that section 18 of the 1957 Act, the section empowering the local authority to require works to be done to underground rooms or make closing orders on the ground of unfitness, is no longer subject to section 4.

Rating and Valuation Act, 1959. This Act postpones the coming into force of the new valuation lists from April 1, 1961, to April 1, 1963. It also postpones until March 31, 1963, the coming into effect of notices served under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, to terminate or reduce the rate relief enjoyed by charitable and quasi-charitable organisations under the section.

As a result of the new terms of employment recently negotiated by the printing industry, our costs of production have increased by not less than 7½ per cent.

With great regret, therefore, we are compelled to increase the subscription for 1960 to £2 10s. 0d.

CAPITAL REDUCTION AND ITS EFFECT ON CLASS RIGHTS

By D. G. Rice, M.A., LL.B., PH.D., Barrister-at-Law

" Subject to confirmation by the court, a company limited by shares . . . may, if so authorised by its articles, by special resolution reduce its share capital in any way . . ." So provides section 66 of the Companies Act, 1948. It is the purpose of this article to consider the question of capital reduction (*a*) so far as it relates to (i) the incidence of such reduction, (ii) the effect thereof on class rights, and (iii) the safeguards that exist against the use of section 66 for oppressive variations of class rights.

The Incidence of a Reduction

One outstanding feature of section 66 is that it does not specify the manner in which a reduction shall take place. In fact by the phrase " in any way " it expressly leaves the field wide open. In the words of Lord Macnaghten in *British & American Trustee & Finance Corpn.* v. *Couper* (*b*): " . . . the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free." Thus, as far as the incidence of a capital reduction is concerned a company is free to impose either (i) a rateable reduction of all classes, or (ii) a reduction of a particular class, or (iii) a reduction of particular shares of a particular class.

However, despite the wideness of section 66 there are nevertheless certain principles governing the manner in which share capital shall be reduced. The first is that, where there is no preference as to return of capital on a winding up, prima facie a reduction must fall rateably on all classes of shares (*c*). " Prima facie it

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(*a*) Capital reduction includes both the writing off of capital lost and also the repayment of capital surplus to requirements.

(*b*) [1894] A.C. 399 (H.L.), at pp. 411, 412.

(*c*) *Bannatyne* v. *Direct Spanish Telegraph Co.* (1886) 34 Ch.D. 287 (C.A.); *Re Barrow Haematite Steel Co.* (1888) 39 Ch.D. 582; *Re Quebrada Rail. Land & Copper Co.* (1889) 40 Ch.D. 363; *Re Mackenzie & Co.* [1916] 2 Ch. 450. *Cf.* also *Re Direct Spanish Telegraph Co.* (1886) 34 Ch.D. 307; *Re Union Plate Glass Co.* (1889) 42 Ch.D. 513; *Re Credit Assurance & Guarantee Corpn.* [1902] 2 Ch. 601 (C.A.).

The reduction will normally be on the nominal capital (*Re Credit Assurance & Guarantee Corpn., supra*), but it may sometimes be on the paid-up capital (*Re Direct Spanish Telegraph Co., supra*) if this be fair to all the members.

must be made on all the shares of the company, unless there is some express provision to the contrary" (*d*). Thus, "prima facie where there are ordinary shares and preference shares with a preferential right to dividend but without preference as to capital a reduction of capital ought to fall upon both sets of shares equally" (*e*).

Conversely, where there is in fact a preference as to capital, the court will prima facie only approve a reduction if the loss is borne by that class or those classes which have last claim on the assets of the company on a winding up (*f*). Thus, in *Re American Pastoral Co.* (*g*), where the preference shares had a priority over the ordinary capital in any distribution of assets, a scheme involving a reduction of the ordinary shares but no reduction of the preference shares received the court's approval. The same principle was also adopted in *Re Floating Dock Co. of St. Thomas* (*h*), where the loss was borne by the second preference and ordinary shares, the first preference being unaffected (*i*).

However, it must be stressed that the above rules are only of prima facie application. The criterion throughout is "Is the reduction fair and equitable?" (*k*). Or in the words of Lord Simonds in *Scottish Insurance Corpn.* v. *Wilsons & Clyde Coal Co.* (*l*): ". . . important though [the court's] task is to see that the procedure, by which a reduction is carried through, is formally correct and that creditors are not prejudiced, it has the further duty of satisfying itself that the scheme is fair and equitable between the different classes of shareholders." This criterion has been consistently adopted in all the numerous cases involving reductions and the result has been to displace on occasion the prima facie

(*d*) *Per* North J. in *Re Barrow Haematite Steel Co.*, *supra*, at p. 595.

(*e*) *Per* Astbury J. in *Re Mackenzie & Co.*, *supra*, at p. 457.

(*f*) Or if the benefit of the repayment is enjoyed by that class or those classes which have first claim on the company's property on a dissolution.

(*g*) (1890) 62 L.T. 625.

(*h*) [1895] 1 Ch. 691.

(*i*) See, particularly, the dictum of Chitty J. at p. 699, later followed by Stirling J. in *Re London & New York Investment Corpn.* [1895] 2 Ch. 860, at pp. 867, 868.

(*k*) Of course, although the abstract conception of fairness and equity is easily understandable, in practice the actual criterion by which it is to be adjudged in any given instance is beset with difficulty. For example, should regard be had predominantly to capital rights rather than the likelihood of receiving dividends in the future or should the converse apply? The cases give no satisfactory guide whatsoever. No attempt has been made by the courts so far to set up objective standards. They will almost invariably accept the opinion of the majority shareholders. For a consideration of some of the consequences that flow from the absence of a yardstick by which the courts may measure what is fair and reasonable see (1944) 5 U. Toronto L.J. 282 and G. B. Battersby's unpublished London Ph.D. thesis "The Conflict of Property Rights in Company Reconstructions in Great Britain." See also discussion on the burden of proof, *infra*, at pp. 256 *et seq.*

(*l*) [1949] A.C. 462 (H.L.), at p. 486.

rules previously stated. If it can be shown that it would not be unfair to deviate from such rules, the court can give its approval (*m*).

Thus, where there is no priority as to capital, the reduction need not invariably be rateable. For example, in *Re Quebrada Rail. Land & Copper Co.* (*n*), where there were no preferential rights to capital repayment and hence prima facie any loss should have fallen on all classes rateably, the court approved a reduction throwing the whole loss on the ordinary shareholders. The justification for adopting this course was that the members of this class were fully aware of the position, only three out of a total of 621 of them had disapproved of the scheme, and none of these three had bothered to appear when the court was petitioned to confirm the reduction. Similarly, in *Re Gatling Gun* (*o*) the court confirmed a reduction throwing the loss upon one particular class, even though according to the prima facie rule the loss should have been borne by all classes rateably. Here again, the justification for approving the reduction was that the members of the class concerned had consented to the reduction. Admittedly, in the case of *Re Union Plate Glass Co.* (*p*), occurring the year before, Kay J. refused to sanction a reduction on the ground that, since there were no priority rights to capital repayment the court had no jurisdiction to confirm a reduction falling solely on the ordinary shareholders and not all classes rateably. However, this viewpoint was expressly rejected by North J. in *Re Gatling Gun* (*q*). So long as a reduction is fair it need not correspond to the prima facie rule (*r*).

Similarly, where there are in fact preferential rights to capital repayment the court will not invariably adhere to the rule that

(*m*) *Contra*, however, *Re Old Silkstone Collieries, Ltd.* [1954] Ch. 169 (C.A.) (discussed *infra*, at p. 251), where the Court of Appeal held that it had no power to confirm a reduction, fair though it might be, if it involved a violation of the strict rights enjoyed by different classes of shareholders and there had been no previous compliance with the terms of a "variation of rights" clause, assuming such a clause existed.

(*n*) *Supra.*

(*o*) (1890) 43 Ch.D. 628.

(*p*) *Supra.*

(*q*) *Supra*, at pp. 629, 630.

(*r*) Counsel for the company in *Re Gatling Gun*, *supra*, attempted to distinguish this case from *Re Union Plate Glass Co.*, *supra*, on the ground that in *Re Gatling Gun* the ordinary shareholders had agreed to bear the loss, whilst in *Re Union Plate Glass Co.* they were unwilling that the reduction should be otherwise than rateable. Therefore, the court might properly confirm the reduction in *Re Gatling Gun* without conflicting with *Re Union Plate Glass Co.* Whereas in the earlier case the court would have been acting unfairly in approving the reduction, no such obstacle beset the court where the class concerned consented to the reduction of its shares. Unfortunately the force of this argument is completely lost when a reference to the actual report of *Re Union Plate Glass* reveals that the resolution to reduce otherwise than rateably was "carried unanimously, there being present holders, to a large amount, of both ordinary and preference shares."

the loss must be borne in strict accordance with the rights of the various classes on a winding up. Thus, in *Re Allsopp & Sons* (*s*), where the preferred ordinary stock had a priority over the deferred ordinary stock as regards return of capital, the court sanctioned a reduction involving the writing off of 10s. in the £ in respect of the former stock and 16s. in the £ in respect of the latter. According to the prima facie rule the loss should have fallen on the preferred ordinary stock only after the deferred had been extinguished. Here the court adopted the guiding principle of "fairness," and concluded that, in the circumstances, the reduction was equitable, having particular regard to the fact that a large majority of the preferred ordinary stockholders had at their own separate meeting approved the scheme. Similarly, in *Re Showell's Brewery Co.* (*t*), the court approved a reduction even though the loss was not borne in strict accordance with the rights and obligations of the various classes on a winding up. Astbury J. held that, as the scheme had been approved by all classes of members, it was therefore fair (*u*).

We see, then, that although a reduction must prima facie be in strict accordance with the rights of members on a winding up, this rule is not absolute, but may be modified, provided that the reduction is in the court's view fair and equitable (*a*). In fact the company may reduce some only of the shares of a particular class (*b*). It need not always reduce a whole class. Thus, in *British & American Trustee & Finance Corpn.* v. *Couper* (*c*), where it was sought to divorce the company's business being carried on in America from that being undertaken in England, a scheme was devised whereby the American assets were to be made over to the American shareholders, their shares being cancelled, and the English shareholders who retained the English assets were to be given a sum by way of compensation. The effect of cancelling the holdings of the American members would be to reduce capital.

(*s*) (1903) 51 W.R. 644.

(*t*) (1914) 30 T.L.R. 428.

(*u*) However, it must be pointed out that it would seem from the reports that in both *Re Allsopp & Sons*, *supra*, and *Re Showell's Brewery Co.*, *supra*, the variation of class rights arising as a necessary consequence of the proposed reduction had received the sanction prescribed by the terms of a "variation of rights" clause in the articles. If this was the case, the reduction was, in fact, in accordance with the rights of the various classes on a winding up, the rights having been duly modified for this very purpose.

(*a*) Similarly, where the proposed reduction is in conformity with class rights on a liquidation the court will not invariably confirm it, but only where the reduction is fair and equitable: *Re Barrow Haematite Steel Co.* [1900] 2 Ch. 846.

(*b*) But only, it is submitted, where a repayment of capital is involved. It would clearly be inequitable if the reduction were in respect of capital lost.

(*c*) *Supra*.

We, therefore, have a case where some only of the shares of a class were to be reduced. Nevertheless, the reduction was confirmed by the House of Lords, on the grounds that it was fair and equitable. "I do not find a single expression in the Act tending to indicate that the discretion of the court to grant or refuse such an application does not extend to every possible mode of reducing capital" (*d*). Moreover, the various dicta in this case dealing with the principle under discussion were quoted with approval by Lord Macnaghten in the later case of *Poole* v. *National Bank of China, Ltd.* (*e*), where once more it was laid down that a reduction might take any form provided it was fair and equitable as between the different classes of shares. Further, in the subsequent case of *Re Thomas de la Rue & Co.* (*f*), where it was sought to pay off 26,000 out of 40,000 shares of a particular class, the court held that such a reduction was capable of confirmation. Eve J., after referring to the two House of Lords cases cited above, observed (*g*): "It is . . . established that in a scheme for the reduction of share capital a company may differentiate between the holders of the same class of shares at least to the extent of paying off some, and not paying off others."

It is clear, then, that a reduction effected under section 66 can fall in any quarter provided only that it is fair (*h*). In accordance with this principle certain prima facie rules have been established, as a result of which a reduction will normally take effect in conformity with the rights of the different classes on a winding up. Where there are no preferential rights to a repayment of capital, prima facie a reduction will fall on all classes rateably, but where a priority does exist the loss must prima facie be borne by that class or those classes which would bear it on a winding up (*i*). However, these rules are not absolute; they are only indications

(*d*) *Per* Lord Watson, at p. 410. See also his observations at pp. 407, 408, and those of Lord Macnaghten at pp. 415, 416.

(*e*) [1907] A.C. 229.

(*f*) [1911] 2 Ch. 361.

(*g*) At p. 365.

(*h*) Of course, "fair" must not be confused with "wise." The court will not concern itself with the wisdom involved in a reduction of share capital. That is for the members to grapple with. "It is no part of the business of a Court of Justice to determine the wisdom of a course adopted by a company in the management of its own affairs": *per* Lord Loreburn L.C. in *Poole* v. *National Bank of China, Ltd.*, *supra*, at p. 236. See also Eve J. in *Re Jewish Colonial Trust* [1908] 2 Ch. 287, at p. 300, and Lord Macnaghten in *British & American Trustee & Finance Corpn.* v. *Couper*, *supra*, at p. 413. *Cf. supra*, at p. 245, n. (*k*).

(*i*) Where a reduction takes the form of a repayment of capital surplus to requirements and not a writing off of capital lost, the converse of the above rule will, of course, apply, *i.e.*, the benefit of repayment will prima facie attach to the particular class or classes which enjoy on a winding up priority in the return of capital.

of the principle upon which the court will act. The overriding consideration is "Is the reduction fair and equitable?" (*k*).

The Effect of a Reduction on Class Rights

It is clear from what has been said above that a reduction may fall either (a) rateably on all classes, or (b) exclusively on one or more classes only, the remainder being unaffected, or (c) on particular shares of a particular class. We must now see how a reduction in any of these three ways can vary class rights. Let us begin by considering the effect of a rateable reduction of all classes. What is its impact on (i) preferential rights to capital repayment and (ii) preferential rights to dividends? (*l*). As for (i), if the memorandum or articles of association confer on one or more classes priority rights to the return of capital, quite clearly a reduction of all classes rateably will vary the rights of that class or those classes whose capital preference is thus so patently being disregarded. Suppose, for example, the preference shareholders have a prior right to return of capital before both the ordinary and the deferred shareholders, and the ordinary shareholders similarly have a preference over the deferred. If all three classes are reduced rateably, the rights of the ordinary shareholders will have been prejudiced as against those of the deferred, and the rights of the preference shareholders will have suffered as against those of the other two classes. As regards the return of capital the ordinary shareholders will have given up nothing *vis-à-vis* the preference shareholders, and the deferred will have conceded nothing as against either class. Should, however, there be no priority to capital repayment, the rights of the various classes, in so far as they concern the return of capital, will not be affected (*m*).

With respect, however, to preferential rights to dividends, a rateable reduction falling on all classes alike will always have a prejudicial effect on these rights. For example, suppose there are preference shareholders with a right to a dividend of 6 per cent.

(*k*) "The function of the court is to see that the proposed reduction is fair and reasonable in the circumstances of the case": *per* Chitty J. in *Re Floating Dock Co. of St. Thomas*, *supra*, at p. 695.

(*l*) Voting rights—the other main species of class right—will, of course, be unaffected by a rateable reduction.

(*m*) Of course, if the preference shareholders, though not entitled to any priority in the return of their capital, are debarred from participating in surplus assets, it follows that, in the event of the company's prospering after the reduction, the rights of the preference shareholders will be prejudicially affected as against those of other classes. For, whereas the preference shareholders can claim no more on a winding up than their capital as reduced, the ordinary and deferred shareholders are free to take all the remaining assets which may include the difference between the original and the reduced total capital.

per annum in priority to any dividend enjoyed by the ordinary shareholders. Now, the effect of a reduction is to diminish the dividends of the preference shareholders without affecting the ordinary shareholders at all. The latter may declare whatever dividend they like (*n*). They are not restricted in the way that the preference shareholders are. Thus, if the preference shares are reduced by a half, the result is tantamount to reducing the dividend itself by a half. The ordinary shareholders, however, can receive the same sum as that to which they were accustomed merely by declaring twice the old ordinary dividend. Moreover, this prejudicial effect on the class rights of the preference shareholders will operate, of course, regardless of whether or no they have any priority to capital repayment.

It is necessary at this stage to clarify one point. Although we have indicated above the ways in which class rights may be varied by a rateable reduction falling on all classes, it must be realised that these "variations" are not necessarily recognised by the law as "variations," so as to fall within the scope of a "variation of rights" clause (*o*). Thus, although a rateable reduction of all classes will prejudice the dividend rights of the preference shareholders, this does not constitute in law a variation of class rights (*p*). Although from a business point of view the rights have very materially been altered, there has been no variation as understood by the law, the reason being that the preference shareholders never had a right to an annuity of a fixed sum. They merely had a claim to a dividend of a fixed percentage of the nominal value of their holdings, a claim quite unprejudiced by any reduction. It was always possible for their holdings to be reduced. The fact that they never anticipated this would happen is neither here nor there. They must be deemed to have known the position when they subscribed for the shares. Accordingly, the question of whether or not the appropriate consents required by a "variation of rights" clause are necessary before the reduction can take effect does not arise.

However, where there is a priority to *capital* repayment, and a reduction falls rateably on all classes, this obviously does involve a modification of class rights within the meaning of a "variation

(*n*) In most cases, however, the dividend declared must not exceed that recommended by the directors. (*Cf.* article 114 of Table A.)

(*o*) For a discussion of what constitutes a variation of a class right, see the writer's article "Class Rights and their Variation in Company Law" (1958) *Journal of Business Law*, p. 29.

(*p*) See Cotton L.J. in *Bannatyne* v. *Direct Spanish Telegraph Co.* (1886) 34 Ch.D. 287 (C.A.), at pp. 300–302, and Astbury J. in *Re Mackenzie & Co.* [1916] 2 Ch. 450, at p. 457. *Cf.* also Evershed M.R. in *White* v. *Bristol Aeroplane Co.* [1953] Ch. 65 (C.A.), at p. 73.

of rights " clause. For, although all members of a company take their shares subject to the possibility of a subsequent reduction, nevertheless, if the reduction falls otherwise than in accordance with their priority to a return of their capital, this will constitute a legal alteration of their class rights within the scope of a " variation of rights " clause.

An interesting problem at once arises. Must the terms of the " variation of rights " clause (assuming there is one) be complied with before a reduction can be effected? Or does section 66 override such a clause, so that once its provisions have been satisfied compliance with further conditions are rendered unnecessary? The latest case touching on this point—*Re Old Silkstone Collieries, Ltd.* (*q*)—is a clear authority for the view that the terms of any " variation of rights " clause in existence must be fulfilled before a reduction can take effect. The facts of the case were that on two previous occasions the preference stock had been reduced subject to the express condition that the holders should retain their rights under section 25 of the Coal Industry Nationalisation Act, 1946, as though there had been no reduction. It was now sought to extinguish the preference stock altogether, which would involve also the extinction of the rights under section 25 expressly reserved to its holders. It was held by the court (i) that the rights under section 25 were special rights which could only be modified in accordance with the terms of the " variation of rights " clause there operating and, as this had not been done, the reduction could not be confirmed, and (ii) that the reduction was not fair, so that it could not be approved by the court. The point with which we are immediately concerned is the unanimous conviction (*r*) of all three Lords Justices that, where a reduction involves an alteration of class rights, the terms of a " variation of rights " clause, if there be one, must be strictly complied with before the reduction can receive the court's confirmation. The only problem in issue before the court was whether the rights under section 25 were class rights. Each of the learned Lords Justices took it for granted that, if the rights were indeed rights special to the preference stockholders, they could only be modified in accordance with the provisions of the " variation of rights " clause. In fact, counsel for the company admitted this without argument. We have, then, in *Re Old Silkstone Collieries, Ltd.* (*s*), a very clear authority for the view that, where a reduction involves a modification of class rights, the terms of a " variation of rights " clause,

(*q*) [1954] Ch. 169 (C.A.).
(*r*) Expressed in the most unequivocal terms by Jenkins L.J. at pp. 195, 196, and by Evershed M.R. at p. 181.
(*s*) *Supra.*

if any such exists, must be complied with before the court is competent to confirm it.

Moreover, support for this view can be found in the two earlier authorities, *Bannatyne* v. *Direct Spanish Telegraph Co.* (*t*) and *Re Showell's Brewery Co.* (*u*). For, in the former case Cotton L.J. would seem to have held that if the reduction of preference shares there proposed was "contrary to the bargain made by the directors of the company with those who took preference shares," *i.e.*, if it involved a variation of the preference shareholders' rights and was carried out without compliance with the terms of any "variation of rights" clause there operating (*a*), the court could not confirm it. And similarly in *Re Showell's Brewery Co.* (*u*) (where it would seem the articles of association contained a "variation of rights" clause) Astbury J. sanctioned a reduction involving an alteration of class rights only because "the necessary meetings of the classes had been held and resolutions approving the scheme passed by the requisite majority." Both cases imply that, where a reduction involves a legal modification of class rights, section 66 cannot override the necessity for compliance with the terms of a "variation of rights" clause, if one exists.

However, despite the above cases there is authority for the view that the court has an unfettered right to confirm a reduction, provided only that the formal requirements of section 66 have been fulfilled and that the reduction is fair and equitable (though, of course, compliance with the terms of a "variation of rights" clause may go far to persuade the court that the reduction is indeed fair). The clearest case in support of this view is *Re Allsopp & Sons* (*b*), where a reduction involved a modification of class rights, and the existence of a "variation of rights" clause is implicit. Although the court gave its confirmation, it is clear that it did so because on the facts of the case it considered the reduction fair, not because the scheme had been approved by the appropriate majorities of each class affected. The approval of large majorities of each class (presumably the majorities were such as were required by the terms of the "variation of rights" clause) was not a vital prerequisite of the court's confirmation of the reduction, it was merely an important factor in inducing the court to consider the reduction fair. Moreover, in all the cases bearing

(*t*) *Supra.*
(*u*) *Supra.*
(*a*) If it did comply, obviously it would not be contrary to the bargain made between the company and the preference shareholders. Modification of the preference shareholders' rights in accordance with the terms of a "variation of rights" clause would quite clearly be in keeping with their bargain or contract with the company.
(*b*) *Supra.*

on the subject (with the exception of the three cited above in support of the contrary view) the judgments seem to proceed on the basis that the court may confirm a reduction provided only that (i) the formal requirements of section 66 have been complied with and (ii) the reduction is fair.

A House of Lords authority for this conclusion can be found in *Carruth* v. *Imperial Chemical Industries* (*c*). Here article 71 provided, *inter alia*, that (a) variations of class rights and (b) a reduction of the shares of a particular class "in a manner not otherwise authorised by these articles" could only be brought about by the passing of an extraordinary resolution by the members of the class concerned. (This article in effect constituted a "variation of rights" clause.) It was sought to extinguish the deferred shares, such an attempt being in defiance of the holders' strict rights under the articles (for the reduction should have fallen on all classes rateably). Now, the extinction of the deferred shares, which constituted a variation of class rights, could properly be effected under article 71. However, the terms of the article were not, in Lord Blanesburgh's view, properly complied with (*d*) and, as a result, he held (*e*) that: ". . . no confirmation of that reduction could be given unless the court—and now this House—was able to avow itself on the evidence judicially satisfied that this reduction, not in accordance with the company's articles, was nevertheless, in effect, fair and equitable to the deferred shareholders." The implication of this dictum is that, provided a reduction is fair, the court may confirm it, even though it involves a variation of class rights and the terms of the particular clause of the articles governing such a variation have not been complied with. In fact, in *Carruth* v. *Imperial Chemical Industries* Lord Blanesburgh held the reduction fair and equitable (*f*).

It is submitted, then, that despite the contrary view held by the Court of Appeal in the relatively recent case of *Re Old Silkstone Collieries, Ltd.* (*g*) (supported further by *Bannantyne* v.

(*c*) [1937] A.C. 707 (H.L.), which in the matter under discussion followed the earlier House of Lords case, *British & American Trustee & Finance Corpn.* v. *Couper* [1894] A.C. 399 (H.L.).

(*d*) But on this point Lord Maugham and Lord Russell of Killowen disagreed.

(*e*) At p. 749.

(*f*) Unfortunately the clarity of his dictum is somewhat marred by his apparent assertion (at p. 744) that the reduction of the deferred shares could be effected if *either* (a) the terms of article 71 were complied with *or* (b) the reduction was shown to be fair and equitable. This would seem to be going too far. Whereas it may be reasonable to hold in the light of the authorities that a reduction involving a modification of class rights may, despite failure to comply with a "variation of rights" clause, be effected under s. 66 provided only that it is fair, the converse cannot be true. A reduction under s. 66 which conforms to the terms of a "variation of rights" clause, but is unfair or inequitable, cannot take effect.

(*g*) *Supra*.

Direct Spanish Telegraph Co. (*h*) and *Re Showell's Brewery Co.* (*i*)), nevertheless in the light of such cases as *Re Allsopp & Sons* (*k*) and *Carruth* v. *Imperial Chemical Industries* (*l*) the better view is that the court has an unfettered power of confirming a reduction provided only that the conditions of section 66 have been fulfilled and that the reduction is fair and equitable (*m*).

We have seen so far the effect on class rights of a rateable reduction of all classes of shares. We must now consider the consequences that flow from a reduction of one particular class, all others remaining unaffected. As for the effect on dividends, it is only the preference shareholders who run the risk of having their rights prejudiced. For whereas a specific reduction of this class (*n*) will obviously diminish their income (*o*), the same fate will not befall the ordinary or deferred shareholders should it be they who suffer such a reduction. For the company is still free to increase their dividend proportionately to the reduction of their shares, thereby providing them with an undiminished income. But where the rights of members on a winding up are concerned, the position of any class (*i.e.*, not merely the preference shareholders) is liable to be affected by a reduction. For if a reduction should fall on a class which would not be the first to bear a loss of capital on the company's liquidation (*p*) (assuming such a reduction was deemed just and equitable), that class would clearly suffer a prejudicial variation of its class rights. For example, if there should be no preference as to capital (where prima facie any loss should be borne by all classes rateably) and if a reduction should fall on the ordinary shareholders only, the preference shares being unaffected (as happened in *Re Quebrada Rail. Land & Copper Co.* (*q*)), obviously the rights of the ordinary shareholders would be detrimentally altered.

Finally, we must consider the effect of a reduction of particular shares of a particular class. How does this affect class rights? Clearly the extinction of certain shares may well have serious repercussions on the voting control of the company. For example,

(*h*) *Supra.*
(*i*) *Supra.*
(*k*) *Supra.*
(*l*) *Supra.*
(*m*) This is certainly the view of the Scottish courts: see *Re Fife Coal Co.*, 1948 S.C. 505; *D. M. Stevenson & Co., Ltd.* (1937) 81 S.J. 922.
(*n*) It is difficult, however, to imagine a reduction of the preference shares only as being fair and equitable.
(*o*) It has already been demonstrated at p. 250 that the dividend rights of preference shareholders do not entitle them to a fixed sum, but only to a fixed percentage of the nominal value of their capital.
(*p*) Or if a preferential return of capital were denied to a class legally entitled thereto.
(*q*) *Supra.*

if, as will usually be the case, voting control vests in the ordinary shareholders, the partial reduction of that class may cause its voting power to be outweighed (*r*) by the preference shareholders who have not been so reduced. Moreover, it should also be pointed out that as regards dividend rights a repayment of some of the preference shares will ensure the availability of further sums for declaration as dividends for the ordinary shareholders (*s*), but a reduction of the ordinary shares will not benefit reciprocally the preference shareholders.

Safeguards against Oppressive Use of Section 66

We have seen, so far, the ways in which a reduction under section 66 may result in a variation of class rights. It falls to us now to consider what protection is available against oppressive use of the section. The first and most obvious safeguard is the requirement that a special resolution be passed before a reduction under section 66 may take effect. As such a resolution requires a three-fourths majority in value of those present in person or by proxy, some protection can be derived from the necessity of complying with this condition. However, the safeguard is very limited, particularly where the rights of preference shareholders are involved, since normally the latter have only restricted voting power (*t*).

A more substantial protection is to be found in the requirement that the resolution for reduction must be confirmed by the court. The object of inserting this provision in the section was to safeguard all members of whatever class against oppressive treatment at the hands of the majority of the class with voting control. In the words of Lord Macnaghten in *British & American Trustee & Finance Corpn.* v. *Couper* (*u*): "The public, the shareholders, and every class of shareholders individually and collectively, are protected . . . by the discretion which is entrusted to the court. Until confirmed by the court the proposed reduction is not to take effect."

(*r*) If not on all occasions, at any rate on the happening of certain specified events (*e.g.*, when the preference dividend is six months in arrears). But this, whatever its commercial effects, will not constitute a *legal* variation of the ordinary shareholders' class voting rights.

(*s*) Assuming, of course, the return of capital involved does not diminish the company's earnings.

(*t*) It will also be remembered that, if advantage is to be taken of s. 66, the articles of association must contain a clause empowering the company to reduce its share capital. However, the absence of such a clause presents no difficulty, as it can be inserted merely by the passing of a special resolution. If a company can pass a special resolution to reduce, it can pass a similar resolution to insert in the articles of association the clause in question.

(*u*) *Supra*, at p. 411.

However, an examination of the principles governing the exercise of the court's discretion will show that this protection is more theoretical than real. As we have seen already, the criterion adopted by the court is "Is the proposed reduction fair and equitable?" Now, the effect of this criterion can only be properly understood in the light of another factor—the onus of proof. We must consider, then, on whom the burden of proof falls when it is sought to confirm a resolution for reduction. Are those petitioning for confirmation required to prove the reduction fair, or do those opposing the confirmation have to show it to be unfair? The outcome of this question will very materially affect the value of this second protection to those with only minority voting rights.

Before we proceed further, however, we must distinguish between two different situations, *viz.* (i) where a proposed reduction has received from each class affected an approval appropriate to a straightforward modification of its class rights under a "variation of rights" clause, and (ii) where no such approval has been given, and the proposed reduction has only the support of a special resolution passed by the company in general meeting. Clearly, the case for confirming a reduction is far stronger in (i) than (ii) (*a*). For example, suppose it is intended to reduce the preference and ordinary shares rateably, though according to the articles the loss should be borne by the ordinary shareholders alone. Now, if the preference shareholders have approved the reduction in the way they would any simple modification of their class rights under a "variation of rights" clause, the danger of their being oppressed is far less likely than if no such approval had been given and the special resolution passed by the company to comply with section 66 had been brought about by the voting control of the ordinary shareholders. Bearing in mind, then, this distinction between (i) and (ii), might the onus of proof be different in each case? Let us examine the cases to see what light they throw on the problem. As regards (i) there is clear authority in *Re Welsbach Incandescent Gas Light Co.* (*b*) and in *Re Showell's Brewery Co.* (*c*) to show that, where a proposed reduction of a particular class has received the same approval as would be appropriate to any straightforward modification of its class rights under a "variation of rights"

(*a*) In the absence at any rate of cross-holdings on any material scale. For clearly the strength of the above assertion will be seriously undermined if those approving a variation of the rights of a particular class are substantially interested in another class and stand to gain over all by a prejudicial modification of the rights of the former class for the benefit of those of the latter.

(*b*) [1904] 1 Ch. 87 (C.A.). See particularly Stirling L.J. at p. 101.

(*c*) *Supra.*

clause, the burden of proof falls upon those of the class who oppose the confirmation. They must show the reduction inequitable. The court will hold the reduction fair, unless it can be proved otherwise by those opposing the petition.

But what happens where the class affected by a proposed reduction has not given its approval to the projected change? Will the court, acting merely on the special resolution (which may well have had only the support of the class with voting control), still consider the reduction fair unless those opposing the confirmation can prove otherwise? Or will the court now say that the burden of proof shifts and that it rests on those bringing the petition to establish that the reduction is equitable? The question is not entirely free from difficulty. There are conflicting dicta. For, first, we find in Lord Blanesburgh's judgment in *Carruth* v. *Imperial Chemical Industries* (*d*) dicta which suggest that the burden of proof lies with those bringing the petition. For he speaks of a reduction being capable of confirmation by the court only if the company has " affirmatively established that the reduction . . . was . . . fair and equitable " (*e*). Moreover, the learned Lord of Appeal professes to base this view on the principle contained in the House of Lords decision, *British & American Trustee & Finance Corpn.* v. *Couper* (*f*).

Against this, however, we have Evershed M.R.'s very clear and dogmatic dicta contained in the comparatively recent case of *Re Old Silkstone Collieries, Ltd.* (*g*), to the effect that those opposing a reduction must prove it to be unfair; otherwise the court will confirm it (*h*). Moreover, in expressing these dicta the learned Master of the Rolls was only following two previous House of Lords cases—*Scottish Insurance Corpn.* v. *Wilsons & Clyde Coal Co.* (*i*) and *Prudential Assurance Co.* v. *Chatterley-Whitfield Collieries* (*k*).

It is to be particularly remembered that in *Re Old Silkstone Collieries, Ltd.* (*l*) and the two House of Lords cases cited, the preference shareholders who were affected by the proposed reduction had not approved it with the majority appropriate to a

(*d*) *Supra.*

(*e*) Although it was argued that the deferred shareholders (who were the class opposing the confirmation) had at a class meeting approved of the reduction with the same majority as that required for a valid alteration of a class right under art. 71 (a " variation of rights " clause), Lord Blanesburgh refused to accept this contention. Therefore, as far as his judgment is concerned this case falls within group (ii) and not (i).

(*f*) *Supra.*

(*g*) *Supra. Cf.* also *Re Thomas de la Rue & Co., supra.*

(*h*) See p. 186.

(*i*) *Supra.*

(*k*) [1949] A.C. 512 (H.L.).

(*l*) *Supra.*

"variation of rights" clause. In fact, there was very strong opposition from the class. Thus, in the *Scottish Insurance* case (*i*) those opposing the petition held about 45 per cent. of the first and second preference stock. Nevertheless, despite this the court held that the onus of proof rested on those who alleged the reduction was unfair.

It falls to us to consider, then, which of these two views is the correct one: the principle laid down by Lord Blanesburgh in *Carruth* v. *Imperial Chemical Industries* (*m*) or that stated by Evershed M.R. in *Re Old Silkstone Collieries, Ltd.* (*n*). It is submitted that the weight of authority favours the latter view. Evershed M.R. has the support of two House of Lords cases, whereas no further authority can be found for Lord Blanesburgh's contention, however much it may accord with natural justice. Admittedly, he cites the *Couper* case (*o*), but an examination of the judgments there does not reveal any satisfactory support. It is submitted, then, that it may be fairly concluded that, where judicial confirmation is sought to a reduction of share capital, the court will invariably consider it fair unless those opposing the petition can prove the reduction to be inequitable, and this principle holds good not merely where each class affected has approved the reduction in the way it would a straightforward alteration of its class rights under a "variation of rights" clause, but also where the only support for the reduction is a special resolution passed by a majority of the class with voting control, which need not necessarily be identifiable with the class whose shares are being reduced.

The effect of this conclusion is to render largely ineffective the second protection afforded dissentients. Although a reduction before it can take effect must receive confirmation by the court and such confirmation will not be forthcoming unless the reduction is "fair," in practice the reduction will always be confirmed in the absence of the very strongest evidence that it is inequitable. The court will not consider the proposal subjectively. So long as the petitioners can give some semblance of reasonableness to their argument, the presumption in their favour is almost irrebuttable. Admittedly, in 1889 in *Re Quebrada Rail. Land & Copper Co.* (*p*) and *Re Union Plate Glass Co.* (*q*), and eleven years later in *Re Barrow Haematite Steel Co.* (*r*), the court did refuse to confirm a reduction, but since then there has been no single instance where

(*m*) *Supra.*
(*n*) *Supra.*
(*o*) *Supra.*
(*p*) *Supra.*
(*q*) *Supra.*
(*r*) *Supra.*

the court has refused its consent (on the grounds that the reduction was oppressive in character) until the comparatively recent case of *Re Old Silkstone Collieries, Ltd.* (*s*), where in fact the evidence for holding the reduction unfair was overwhelming. It is clear, then, that this second protection against oppressive use of section 66 to vary class rights is in practice of very little effect (*t*).

A third safeguard against oppression is section 210. Under this section any shareholder who considers the affairs of the company are being conducted in a manner oppressive to some of the members may petition the court for relief. This section is new and it would appear the court has large discretionary powers under it to afford whatever remedy is thought expedient in the circumstances (*u*). However, if the court considers the reduction fair, which, as we have seen, it usually will, it is difficult to see why the court should give relief under this section. If the court confirms a resolution for reduction in pursuance of section 66, why should it subsequently give relief under section 210? It is submitted, then, that none of these three so-called safeguards against oppressive use of section 66 is particularly effective. If the majority of the class with voting control wish to prejudice the rights of other classes or the rights of the minority of their own class by effecting a reduction under section 66, the law does very little to check them except in circumstances where they are obviously acting outrageously. The real curb can only be publicity and commercial morality.

(*s*) *Supra.*

(*t*) The position is summarised by Lord Cooper in the *Scottish Insurance* case when it was before the Court of Session, 1948 S.C. 360, at pp. 375 *et seq.*

(*u*) For recent examples of its application see *Scottish Co-operative Wholesale Society, Ltd.* v. *Meyer* [1958] 3 W.L.R. 404 (H.L.) and *Re H. R. Harmer, Ltd.* [1959] 1 W.L.R. 62.

THE LANDS CLAUSES ACT—A REVIEW

By A. S. Wisdom, Solicitor

One of the current legal fashions is an outstanding enthusiasm for statute law reform and revision. The latest victim is highway law, where the Highways Bill, lately off the assembly belt and now an Act, seeks to repeal, reduce and absorb upwards of fifty Acts concerned with highways, streets and bridges. No doubt, even now, further sacrificial statutes are being prepared before the altar of the Statute Law Revision Committees.

There is, however, no apparent sign that the Lands Clauses Acts, 1845–1895, are on any future short-list for revision, and it is the purpose of this article to see how these Acts have survived the test of time and what vestiges remain of practical use today. Could the Acts, for instance, be the basis or nexus of a forthcoming consolidation statute on compulsory purchase law, or have they, in fact, already been superseded by later Acts which render a revising statute unnecessary?

What are the Lands Clauses Acts? By section 23 of the Interpretation Act, 1889, this expression means:

> the Lands Clauses Consolidation Act, 1845,
> the Lands Clauses Consolidation Act Amendment Act, 1860,
> the Lands Clauses Consolidation Act Amendment Act, 1869,
> the Lands Clauses (Umpire) Act, 1883, and
> the Lands Clauses (Taxation of Costs) Act, 1895.

The principal statute of this group is the Act of 1845 (the others being minor amending Acts), which was passed to consolidate general provisions relating to the acquisition of land required for undertakings or works of a public nature, and compensation to be paid in respect thereof, so that these provisions could be incorporated into special Acts authorising the acquisition of land so required.

What did the Lands Clauses Acts set out to accomplish? First, they provided powers for public bodies to purchase land both by agreement and compulsorily, and particular points of procedure were inserted to deal with such matters as entry on the land, conveyancing costs, what to do with reluctant sellers, vendors under disability, the resale of superfluous land, notices, penalties, etc. At the same time, provisions were included for acquiring special interests in land, *e.g.*, leases, rentcharges, mortgaged land,

common land, intersected lands. These powers could only be set in motion by a subsequent special Act which defined the public body, the land to be acquired and the purposes for which it was required. The special Acts were gradually replaced by general statutes prescribing a simplified procedure for authorising compulsory purchase—first provisional orders subject to confirmation by Parliament, then provisional orders being confirmed by a Minister, and now compulsory purchase orders confirmed by a Government Department.

Secondly, the Act of 1845 provided that compensation was payable in respect of the value of the land taken, and for damage due to severance and injurious affection, and that the compensation should be settled in case of dispute by various forms of tribunals. What the Act did not establish was how the compensation should be assessed, and it was left for the courts to determine certain principles of assessment progressively and gradually over the years.

Compulsory acquisition then, as envisaged in the Act of 1845, consisted of two parts—(1) powers and procedure for the taking of land, and (2) a system of compensation payable on the taking of the land—and the invariable rule is that compensation always follows compulsory acquisition. It is very important to appreciate this double feature of the subject-matter, since it is not only the basis of the Lands Clauses Acts, but, in the years following, these Acts have undergone profound modifications which have developed quite naturally along these two broad lines.

It is, indeed, difficult to attempt to bridge the sociological, economic and political gaps which separate conditions in 1845 from the present ones. In the early nineteenth century the field of compulsory acquisition was confined mostly to companies busily straddling the country with canals and railways and promoting gas, water, harbour and similar undertakings. Today we have Government Departments, public authorities and special corporations conducting vast enterprises, each with their particular powers of compulsory purchase. These are some of the differences which we must try to visualise in understanding the reasons and purposes which have both modified and expanded the provisions of the Lands Clauses Acts.

Omitting, largely for the sake of space, a detailed history of these alterations since 1845, the process for authorising the compulsory acquisition of land in most cases is now contained in the Acquisition of Land (Authorisation Procedure) Act, 1946, which applies compulsory purchase order procedure to the great majority of powers of purchase exercised by central, local and public

authorities. The rules and principles governing the assessment and determination of compensation are now embodied in the Acquisition of Land (Assessment of Compensation) Act, 1919, as modified by the Lands Tribunal Act, 1949, and the compensation provisions of the Town and Country Planning Acts, 1947–1954 (which in turn are to be drastically revised under the Town and Country Planning Bill, now before Parliament).

It should be emphasised that none of the subsequent statutes was concerned with repealing those parts of the Lands Clauses Acts which they have replaced or superseded; they have, in effect, installed modern machinery on top of the original legislation, which has been left to rust and decay. It is true, also, that a few sections of the Lands Clauses Acts have been expressly repealed, as opposed to many other provisions of the Acts which have been replaced or rendered obsolete.

The Act of 1845 is not split into parts, after the habit of modern statutes of any length, but its sections are grouped in portions according to the subject-matter, each portion being distinguished by introductory headings. To ascertain the changes wrought on the Act by subsequent legislation, and to see what remains of practical importance today, it is necessary to examine these portions and the sections within them.

Section 1. The Act is applied to all undertakings authorised by Acts passed thereafter to purchase land, save as expressly varied or excepted by such Acts. In practice, the Act is expressly incorporated in statutes which authorise the purchase of land by public authorities: see, for instance, section 176 of the Local Government Act, 1936; section 1 (3) and Schedule II, paras. 1 and 2, of the Acquisition of Land (Authorisation Procedure) Act, 1946 (which is hereafter referred to as " the Act of 1946 ").

Interpretation

Section 2. This section refers to the interpretation of expressions used in the Act, including " the special Act " and " Promoters of the undertaking." Schedule II, para. 1, of the Act of 1946 provides that the enactment under which the purchase is authorised and the compulsory purchase order are deemed to be the special Act and that the authority authorised by the compulsory purchase order to acquire land are the promoters.

Section 3. This section gives the meanings of certain words and expressions used in the Act and the special Act; in particular, " lands " extends to messuages, lands, tenements and hereditaments of any tenure. By section 8 (1) of the Act of 1946 the

meaning of "land" is left to any definition of that expression contained in the statute authorising compulsory purchase.

Section 4 states the short title of the Act.

Section 5 permits portions of the Act to be incorporated in other Acts by reference to the words introductory to such portions.

Purchase of Lands by Agreement

Section 6. This section empowers the promoters to purchase by agreement with the owners the land authorised to be taken subject to the provisions of the Act and the special Act.

Sections 7–9. These sections permit persons under disability to sell and convey land to the promoters and for the purchase money or compensation to be ascertained by valuation and deposited in a bank. Many disabilities were removed by the 1925 property legislation.

Sections 10 and 11. These sections, as extended by section 2 of the Lands Clauses Consolidation Act Amendment Act, 1860, provide that compensation may be paid by way of an annual rent-charge; but this procedure is not often adopted.

Sections 12–14. These sections deal with the purchase of additional land by the promoters for extraordinary purposes where empowered to do so by the special Act. This does not apply to local authorities, who are authorised under a number of statutes to purchase land in advance of their immediate requirements.

Section 15 prohibits municipal corporations from selling land acquired for the purposes of the special Act without Treasury consent. Nowadays borough councils can sell land under numerous statutes.

Purchase of Lands Otherwise than by Agreement

Sections 16 and 17. These require capital to be subscribed before the compulsory powers are put into force where the promoters intend to carry out the works by subscription. This is not applicable to local authorities who usually finance their undertakings out of revenue or by loan.

Section 18. The promoters are required to serve notice to treat on all persons interested in the land being compulsorily acquired. A substantial body of case law has developed around notices to treat, which are one of the main planks in the modern compulsory purchase system.

Sections 19 and 20 deal with the method of serving notices to treat and have been extended by Schedule I, para. 19, and

Schedule II, para. 6, to the Act of 1946 to allow service by registered post.

Section 21. If the parties served with notice to treat (1) fail to state their particulars of claim within twenty-one days after service, or (2) fail to treat with the promoters, or (3) dispute the amount of compensation, then the amount of compensation is to be settled in the manner prescribed.

Sections 22–57. These prescribe the procedure relating to the determination of disputed compensation by justices, jury or arbitration, as appropriate, and have been generally superseded by the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, as varied by the Lands Tribunal Act, 1949, that is to say, where land is being compulsorily acquired by a Government Department, local or public authority, or statutory undertakers, any question of disputed compensation is determined by the valuation of a member selected from the Lands Tribunal. In particular, section 41 is now excluded by section 1 of the Juries Act, 1949; sections 51 and 52 have been amended by section 12 of that Act; and sections 54–56 have been repealed by that Act. Section 49 warrants special attention because it sets out the heads of compensation—see the note to section 63.

Sections 58–62 provide machinery for determining compensation payable to absent parties, but the valuation is now conducted under the Acquisition of Land (Assessment of Compensation) Act, 1919, and the Lands Tribunal Act, 1949.

Section 63. In estimating the purchase money or compensation to be paid by the promoters, regard is to be had to (1) the value of the land being purchased, (2) damage sustained by the owner due to the severance of the land taken from his other land, and (3) injurious affection to his other land by the exercise of the compulsory powers. This section should be read in conjunction with section 49 and compared with section 68. Under sections 49 and 63 the courts have evolved rules for assessing the measure of compensation payable on the compulsory purchase of land; the modern rules are now embodied in section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, as amended by the compensation provisions of the Town and Country Planning Acts, 1947–1954.

Sections 64–67, which deal further with compensation to absent parties, have been rendered obsolete by the Acquisition of Land (Assessment of Compensation) Act, 1919, and the Lands Tribunal Act, 1949.

Section 68 provides for compensation in cases where the claimant's land is not taken, but is injuriously affected by the

execution of authorised works on land which is taken. The principles governing the payment of compensation under this section for injurious affection are quite different from those concerning compensation payable for injurious affection under section 63. Any question of disputed compensation under this section against an authority to whom the Acquisition of Land (Assessment of Compensation) Act, 1919, applies is determined by the Lands Tribunal.

Application of Compensation

Sections 69–75 provide methods of paying the purchase money or compensation to parties under disability. These sections are now seldom used as many disabilities were removed by the 1925 property legislation.

Sections 76–80 enable an acquiring authority to deposit the compensation agreed or awarded into court where the owner of the land being acquired refuses to convey, or to show his title, or cannot be found, etc. Upon payment into court the authority may execute a deed poll which has the effect of causing the land to vest absolutely in them.

Conveyances

Section 81. Conveyances of land acquired under the provisions of the Act of 1845 or the special Act may be according to the forms in Schedules A and B to the Act. These forms are not used in practice and have been replaced by modern forms.

Section 82. The costs (including charges and expenses) of conveyances must be borne by the acquiring authority.

Section 83. If the amount of the costs of conveyances is disputed, the costs are to be taxed by a taxing master, and the expense of taxing is to be borne by the acquiring authority unless one-sixth of the amount is disallowed on taxation, in which case the other party bears the cost of taxation.

Entry on Lands

Sections 84–90. These sections enable an acquiring authority to enter upon the land being acquired before completion of the purchase. Sections 84 and 85 have been replaced by Schedule II, para. 3 (1), of the Act of 1946 in relation to purchases authorised under that Act. This provides that the acquiring authority may, at any time after service of notice to treat, and after giving the owner, etc., of the land not less than fourteen days' notice, enter upon and take possession of the land, subject to payment of compensation and interest thereon: see also the Housing Act, 1957,

ss. 62, 101, Sched. III, para. 9. It is worth noting that the latter part of section 84 also enables entry to be made for temporary purposes, such as surveys, taking levels, soil samples.

Section 91. In cases where the acquiring authority is authorised to enter upon and take possession of the land required, and the owner, occupier or any other person refuses to give up possession or hinders the authority from entering, the authority may issue its warrant to the sheriff to deliver possession. The cost of issuing and executing the warrant are to be paid by the person refusing to give possession.

Section 92. No party can be required to sell part only of a house or other building or manufactory to the acquiring authority if such party is willing and able to sell the whole thereof. This provision has been substituted by Schedule II, para. 4, of the Act of 1946 as regards purchases authorised under that Act: see also the Public Health Act, 1925, s. 33 (8); the Housing Act, 1936, Sched. III, Pt. II, para. 8 (4).

Intersected Lands

Sections 93 and 94 relate to the treatment of small portions of certain types of land which are intersected by works carried out under compulsory powers.

Copyholds

Sections 95–98, which deal with copyhold land, were rendered obsolete in view of the enfranchisement of copyholds on January 1, 1926, by the Law of Property Act, 1922, s. 128.

Common Lands

Sections 99–107. These provisions are applicable in the comparatively rare cases where the land being acquired is subject to rights of common. Under Schedule I, para. 11, of the Act of 1946 a compulsory purchase order which authorises the purchase of land forming part of a common may be subject to special Parliamentary procedure.

Lands in Mortgage

Sections 108–114. When acquiring mortgaged land, the acquiring authority may deal with the mortgagor and leave him to pay off the mortgage, or purchase the mortgagee's interest and treat with the mortgagor in respect of the equity of redemption. These sections deal with a number of points which may arise in respect of land subject to mortgage.

Rentcharges

Sections 115–118 deal with the release of land subject to rentcharges, etc.

Leases

Sections 119–122. It is not always necessary for the acquiring authority to purchase a tenant's or lessee's interest in land being acquired, since the authority may acquire the freehold interest and wait until the lease expires or serve the tenant with notice to quit. Alternatively, before purchasing the freehold, the authority may persuade the landlord to give notice to quit. These sections provide for the apportionment of rent in cases where part only of a leasehold interest is acquired and as to compensation payable in respect of short tenancies. Questions on the apportionment of rent and the compensation payable to tenants are now determined under the Acquisition of Land (Assessment of Compensation) Act, 1919, and the Lands Tribunal Act, 1949.

Section 123. The powers of an acquiring authority for the compulsory purchase of land cannot be exercised after the expiration of any period prescribed for that purpose in the special Act, and if no period is prescribed, after the expiration of three years from the passing of the special Act. In the case of purchases authorised under the Act of 1946, the period of three years runs from the date on which notice of the confirmation or making of the compulsory purchase order is first published (Act of 1946, Sched. I, paras. 6, 7 (4), 16).

Interests Omitted to be Purchased

Sections 124–126 enable the acquiring authority, after entry on the land, to purchase any interests in the land which they have through mistake or inadvertence failed or omitted to acquire or to pay compensation for.

Sale of Superfluous Land

Sections 127–132 require the acquiring authority within ten years after the expiration of the time limited by the special Act for completing the works to sell all superfluous land acquired under the compulsory powers but which is not required for the purposes thereof; otherwise, all superfluous land remaining unsold at the expiration of that period vests in the owners of adjoining land. These provisions are excluded from incorporation in relation to purchases authorised under the Act of 1946 by Schedule II, para.

2 (a) thereof: see also the Local Government Act, 1933, s. 176; Town and Country Planning Act, 1947, s. 40.

Section 133 makes the acquiring authority liable for making good any deficiency in land tax and rates caused by the land's being taken. This section is excluded from incorporation in relation to purchases authorised under the Act of 1946 in any case where the compulsory purchase order so provides (Act of 1946, Sched. II, para. 2 (b), as amended by the Housing Act, 1957, s. 191 (2), Sched. II).

Notices

Section 134 deals with the service of notices on the acquiring authority: see now the Local Government Act, 1933, s. 286.

Section 135. Tender of amends by any party who has committed any irregularity, trespass or other wrongful proceeding under the execution of compulsory powers may be made to the party injured. If tender of sufficient amount is made before an action is brought, the injured party cannot recover in such action. Where an action is pending payment may be made into court by leave of the court.

Recovery of Penalties

Sections 136–149 relate to the recovery of forfeitures, penalties and costs imposed by compulsory powers. The majority of these provisions have been wholly or partly repealed and, generally speaking, this portion of the Act of 1845 is not applied in practice.

Access to Special Act

Sections 150 and 151 require the promoters to keep a copy of the special Act at their principal office of business, and, in certain cases, copies are to be placed on deposit available for inspection by the public. These sections are excluded from incorporation in relation to purchases under the Act of 1946 (Sched. II, para. 2 (c), thereof): see also the Town and Country Planning Act, 1947, s. 40, and the Local Government Act, 1933, s. 176.

Section 152. The Act does not extend to Scotland.

Section 153. (Repealed by the Statute Law Revision Act, 1875.)

Schedules A and B set out forms of conveyances: see note on section 81 above.

Schedule C. (Repealed by the Statute Law Revision Act, 1892.)

What does this clause-by-clause survey of the Act of 1845 reveal? Out of the 153 original sections, about eight have been

repealed and some eighteen others amended. These trifling alterations are some proof that the legislature, at any rate, have been satisfied with the operation of the Act over the years, and such a long preservation of a statute in constant use speaks well of its sound construction and stability.

On the other hand, ninety-six sections more or less (the exact number is a matter of opinion) are now obsolete or have been excluded or replaced by later legislation, leaving about thirty sections of everyday practical use at the present time and a further nineteen sections of occasional value. This surely indicates beyond doubt that the Act of 1845 is rapidly becoming, if it is not already, out of date and fails to reflect current practice. The sections, both of everyday use and occasional value, are stated below:

Of everyday use

Sections 18–20—Notices to treat.
Section 21—Time limit for settling disputed compensation.
Sections 58–62—Method of determining compensation due to absent parties.
Sections 63, 68—Estimating purchase money and compensation.
Sections 76–80—Purchase money to be deposited where parties refuse to convey, etc.
Sections 82, 83—Costs of conveyances.
Section 91—Proceedings in case of refusal to deliver possession of land.
Sections 93, 94—Intersected lands.
Sections 119–122—Leases.
Section 123—Time limit for compulsory purchase.
Section 135—Tender of amends.

Of occasional value

Sections 99–107—Common lands.
Sections 108–114—Lands in mortgage.
Sections 115–118—Rentcharges.

Now we have seen what is left of the original statute. About two-thirds of the Act of 1845 are either otiose or superseded by subsequent statutes reinforced by a substantial body of case law. There is no indication that the Lands Clauses Acts are likely to be repealed and reconsolidated, and for all that is known these Acts will remain for a long time, having their statutory props replaced and modernised as occasion demands.

It is, however, the writer's opinion (and apparently only his) that a good case can be made out immediately for a fresh statute designed to consolidate the law relating to both compulsory acquisition procedure and compensation, based on the total repeal of the Lands Clauses Acts, 1845–1895, the Acquisition of Land (Assessment of Compensation) Act, 1919, the Acquisition of Land (Authorisation Procedure) Act, 1946, perhaps small parts of the Lands Tribunal Act, 1949, and possibly the provisions of the Town and Country Planning Acts concerned with compensation payable on the taking of land. Some reservation is permissible when considering the inclusion of the compensation provisions of the Planning Acts in this respect, since compensation is now inextricably interwoven with planning control—particularly since the introduction of the Town and Country Planning Bill.

Should it ever be decided that a new consolidation statute is required to deal with compulsory acquisition and compensation law, then, assuming that the terms of reference of the revising committee were wide enough to permit the entire repeal of the statutes as described above, the arrangement of clauses of the new "Acquisition of Land and Compensation Bill" might read something like this:

Incorporation of Act with Other Acts

1. Act to apply to all existing and future Acts authorising the purchase of land for public purposes.
2. Certain sections of the Act to be incorporated where land is authorised to be purchased by agreement.
3. Compulsory acquisition of new easements and other rights.

Compulsory Purchase Order Procedure

4. Procedure for making compulsory purchase orders by local and public authorities and statutory undertakers.
5. Procedure for making compulsory purchase orders by Government Departments.
6. Special provisions as to certain descriptions of land.
7. Validity of compulsory purchase orders.

Supplemental Provisions

8. Service, effect and withdrawal of notices to treat.
9. Particulars of claim.
10. Entry on land before completion.
11. Proceedings to obtain possession of land.

12. Owners not required to sell part of house, etc.
13. Vesting of land in acquiring authority by deed poll where owners cannot be found, etc.
14. Interests omitted to be purchased.
15. Time limit for compulsory purchase.
16. Tender of amends.
17. Costs of purchase and taxation.

Compensation

18. Acquiring authority to pay compensation for value of land taken, and for severance and injurious affection.
19. Rules for assessing compensation to be prescribed by statutory instrument.
20. If parties fail to state particulars of claim, or fail to treat, or in case of dispute, compensation to be determined by Lands Tribunal.
21. Compensation payable to absent parties, etc.
22. Compensation payable into court.
23. Compensation in case of leases.
24. Compensation in case of mortgaged land.
25. Compensation in case of rentcharges.
26. Compensation in case of common land.

THE LAW OF HIGHWAYS

II. The Creation and Extinguishment of Highways*

By J. F. Garner, ll.m., Solicitor

In this article it is intended to outline the rules of the common law and of statute (as contained in the Act of 1959) whereby a highway (of various kinds) may come into existence, be diverted or become extinguished (or "stopped up," to use the traditional though inelegant expression).

1. Creation of a Highway at Common Law

At common law, a highway can come into existence by dedication by the owner of the land and acceptance thereof by the public; this is the only method by which a new highway may be created known to the common law; other methods are creatures of statute. Dedication by the owner may be express or implied, and acceptance is usually established by proving user by the public of the highway as a way "as of right"; but user is not by itself adequate to establish dedication, for "a right of public way cannot be acquired under the Prescription Act" (*a*); dedication will, however, be assumed if it can be shown that a particular way has been used since 1189, the time before legal memory. These principles, are, however, subject to the following:

(a) Dedication may be inferred from an agreement to dedicate land as a highway, entered into between the highway authority and the owner of the land (*b*). A dedication agreement may also be entered into between the parish council and the landowner, under section 33 of the 1959 Act, in any case where the dedication would, in the opinion of the parish council, be beneficial to the inhabitants of the parish or to any part thereof; the parish council do not have to consult with the highway authority before they enter into such

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* This is the second of a series of articles, consequent on the passing of the Highway Act, 1959; the Act does not come into force until January 1, 1960, but the article assumes that its provisions are already law.

(*a*) *Per* Buckley J. in *Att.-Gen.* v. *Esher Linoleum Co., Ltd.* [1901] 2 Ch. 647.

(*b*) This for some years has been the normal procedure whereby a local highway authority have secured the necessary land to effect a widening or minor improvement of the highway, often in consideration of a new fence or boundary wall being erected by the authority at their expense. This practice is now given statutory recognition for the first time by s. 71 (1) of the 1959 Act.

an agreement but the new highway will not become a highway maintainable at the public expense (*c*).

(b) Any dedication to be effective must be by the owner of the land over which the highway runs. This means, normally, the owner of the legal estate in fee simple, and if it can be shown that during the material period (*d*) there was then no owner capable of dedicating (because, for example, the land was held under strict settlement), no dedication could be implied. Thus, tenants for ninety-nine years could not dedicate (*e*) but a remainderman and a tenant for life acting together could form the necessary intention (*f*). Public corporations and trustees are not considered to be incapable of dedicating land as a highway unless and in so far as such dedication is clearly incompatible with their objects imposed by statute or under a trust (*g*).

(c) Since the passing of the Rights of Way Act, 1932 (*h*), now re-enacted in Part III of the 1959 Act, twenty years' user by the public as of right and without interruption (*nec vi, nec clam, nec precario*) will be sufficient to establish that the way has been dedicated as a highway, "unless there is sufficient evidence that there was no intention during that period to dedicate it."

The leading case on what may constitute an interruption for this purpose is *Merstham Manor, Ltd.* v. *Coulsdon & Purley U. D. C.* (*i*); it is in essence a question of fact whether there has been an interruption of the public rights or not. The period of twenty years must be calculated back from the date "when the right of the public to use the way is brought into question" (*k*) and *not* from action brought (as in the case of prescription for private rights of way under the Prescription Act, 1832).

(*c*) Unless and until a highway is constructed by the highway authority (1959 Act, s. 38 (2) (b)), or it is made up and adopted under the private street works procedure (*ibid.*, Part IX).

(*d*) *i.e.*, either the twenty-year period (see para. (c)), or any other time at which it is alleged the presumed dedication occurred.

(*e*) *Wood* v. *Veal* (1822) 5 B. & Ald. 454; the position has been different since 1932—see below.

(*f*) *Farquhar* v. *Newbury R. D. C.* [1909] 1 Ch. 12.

(*g*) The question of incompatibility is one of fact to be determined by a consideration of the probabilities reasonably foreseeable: *British Transport Commission* v. *Westmoreland C. C.* [1957] 2 W.L.R. 1032, and see s. 34 (8) of the 1959 Act, preserving the common law.

(*h*) This Act was retrospective in its effect, dealing with matters of evidence only, in that the methods by which the public rights could be shown to exist as provided for in the Act, apply to periods before 1932 as they do to periods after that date: *Att.-Gen. and Newton Abbot R. D. C.* v. *Dyer* [1947] Ch. 67.

(*i*) [1937] 2 K.B. 77, and see Freeman's *Rights of Way* (4th ed.), at p. 68.

(*k*) 1959 Act, s. 34 (2), and *Fairey* v. *Southampton C. C.* [1956] 3 W.L.R. 354.

"Sufficient evidence" to counter the suggested intention to dedicate inferred from twenty years' user may be established in any admissible manner (*l*), but the Act itself (again replacing the provisions of the 1932 Act) provides for special procedures whereby a landowner can take steps to ensure that the twenty-year period does not run against him. There are two alternatives:

(i) The owner (*m*) may erect, in such manner as to be visible to persons using the way, a notice inconsistent with the dedication of the way as a highway (*n*); where such a notice is erected *after* January 1, 1934, this will operate to shift the burden of proof away from the owner, so that the parties alleging the existence of a public way will have to bring positive evidence to the effect that twenty years' public user had already been established *before* the notice was first erected, or that a public way then existed (*o*). If the notice is subsequently torn down or defaced, the owner may achieve the same effect by giving a notice, to the effect that the way is not dedicated as a highway, to the county borough council or to the county council *and* the county district council in whose area the way is situate (*p*).

(ii) The second procedure, which may be followed in addition to the above, enables an owner of land to deposit with the county borough council (or, in a county area, with the county council *and* the county district council) a map of his land (to a scale not less than six inches to the mile) with a statement indicating what ways (if any (*q*)) he admits have been dedicated as highways over that land. The map and statement themselves will not be conclusive, but where the owner or his successors in title subsequently, within six years of the deposit, makes a statutory declaration which he lodges with the same council(s), to the effect that "no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map had been dedicated as a highway

(*l*) For example, by maps, etc., proved in accordance with s. 35 of the 1959 Act.

(*m*) *i.e.*, a person who is for the time being entitled to dispose of the fee simple in the land: s. 34 (7) of the 1959 Act, and see also s. 34 (5).

(*n*) *Ibid.*, s. 34 (3).

(*o*) In litigation on this subject it should always be remembered that "once a highway, always a highway"; there is no specified time before which it is not relevant to show a highway then existed.

(*p*) 1959 Act, s. 34 (4). This procedure can be used only when a board has first been erected and then destroyed or defaced, and not where the board has become illegible by the action of the elements.

(*q*) The words "if any," did not appear in the corresponding section of the 1932 Act, and they have now been inserted to make it clear that this procedure may be used where the owner does not admit the existence of *any* public ways.

since the date of the deposit," or since the lodgment of a previous declaration to the like effect, any such declaration will (in the absence of proof of a contrary intention) be sufficient evidence to negative any presumed intention of the owner or his successors in title to dedicate any such additional way as a public right of way or highway (*r*).

Neither of these procedures has been widely used in practice since they were introduced in 1932; notices are sometimes erected by a footpath or (in an urban area) a forecourt or alley which it is desired should not become a public right of way, but the notices are not always maintained, and notices, maps or statements are very rarely deposited with the local authority.

(d) Part IV of the National Parks and Access to the Countryside Act, 1949, required county councils (*s*) to carry out reviews of all "public paths" (*t*) in their areas, and to record these paths on maps, carrying out an elaborate procedure enabling landowners and others to make representations. When the procedure has been fully observed (as has happened by now in most parts of the country), the "definitive map" so prepared becomes effective, and section 32 of the 1949 Act provides, *inter alia*, that "where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date specified in the statement a footpath as shown on the map." Any new paths subsequently created would be shown in reviews (to be carried out by the county council every five years (*u*)) and consequently there will not, it would seem, in future be as much scope for argument as formerly, as to the existence of a public path (as distinct from other kinds of highways to which these provisions of the 1949 Act do not apply); it should be noted, however, that the 1949 Act does not operate so as to exclude other methods of establishing that a public right of way in fact exists (*w*), nor does it provide that the absence of any path being shown on the definitive map is to be conclusive evidence that such a path does not exist as a highway (*x*).

(*r*) 1959 Act, s. 34 (6).

(*s*) These provisions may also be adopted by a county borough council: 1949 Act, s. 35 (2).

(*t*) Defined in s. 27 (6) of the 1949 Act to mean a highway which is either a footpath or a bridleway. These provisions of the 1949 Act are not affected by the 1959 Act, although in some other respects the 1959 Act replaces that of 1949.

(*u*) 1949 Act, s. 33 (3).

(*w*) See, for example, the powers and duties of local authorities to safeguard public rights conferred by s. 116 of the 1959 Act, which may be exercised by taking proceedings in the High Court for an injunction, or in the county court if a claim for damages is associated therewith.

(*x*) *Andover Corporation* v. *Mundy* [1955] J.P.L. 518 (a county court decision).

2. Creation of Highways by Statute

The Highways Act, 1959, contains a number of provisions regulating the several statutory methods by which a highway may be created (*y*). These may be summarised as follows:

(a) *Section 26* gives a general power to the Minister of Transport and Civil Aviation (*z*), and to the local highway authority (*a*), to construct new highways. The conversion of an unmade existing highway into a metalled motor road is treated for the purposes of the Act as an improvement (*b*), and not the construction of a new highway. In order to implement their powers under section 26, the Minister or the local highway authority will first have to secure the necessary land. This they may do by obtaining a dedication from the owner (see para. 1 (a) above) or, as will frequently be necessary in practice, they will have to purchase the land, either by agreement or compulsorily. In the case of land required for the highway itself (*c*) they may do this under section 214 of the 1959 Act, and they are also given further powers to acquire land for the purpose of carrying out highway improvements. The procedure for compulsory acquisition is regulated by the Acquisition of Land (Authorisation Procedure) Act, 1946, as if the 1959 Act had been in force prior to the commencement of the 1946 Act (*d*).

(b) *A footpath or bridleway* may be created by an agreement entered into between the local authority (*e*) and any person "having the necessary power in that behalf," for the dedication by that person of a footpath or bridleway. The agreement may provide for payments to be made by the local authority, and the dedication may be accepted subject to limitations or conditions affecting the public use of the way (*f*).

(c) *Under section 28*, where the local authority (*e*) consider there is need for a new public footpath or bridleway, and they are satisfied that it is expedient that such a way should be created, having regard to the matters listed in the section, they may make

(*y*) Trunk roads are dealt with later; improvements will be considered in the next article in this series.

(*z*) With the approval of the Treasury.

(*a*) *i.e.*, any local authority having highway powers; a particular authority can presumably construct only a highway of a kind for which it will be the highway authority.

(*b*) See, *e.g.*, s. 64 (2) of the 1959 Act.

(*c*) Or within 220 yards from the middle of the proposed highway, but not further (s. 214 (3)).

(*d*) 1959 Act, s. 222 (2).

(*e*) The county borough council or the county district council with the consent of the county council.

(*f*) 1959 Act, s. 27.

a "public path creation order." This order must conform with the Minister's regulations (*g*), and the procedure detailed in the Seventh Schedule to the 1959 Act has to be followed; the order will not be effective unless and until it has been confirmed by the Minister (of Housing and Local Government), after a local inquiry if objections are received and are not withdrawn. Such an order, when confirmed, will have the effect of creating a new highway; this will then appear on the map after the next review of public rights of way carried out by the county council under the National Parks and Access to the Countryside Act, 1949 (*h*). Where it is shown that the value of an interest in land is depreciated, or that a person has suffered damage by being disturbed in his enjoyment of land as a consequence of the coming into operation of a public path creation order, the authority by whom the order was made will be liable to pay compensation equal to the amount of the depreciation or damage (*i*). Any dispute as to the amount of such compensation is to be determined by the Lands Tribunal, and rules 2 to 4 of the Acquisition of Land (Assessment of Compensation) Act, 1919 (as amended), will apply to the calculation of the depreciation of the value of any interest in land for this purpose (*k*).

(d) *Section 206* of the 1959 Act, replacing section 48 of the Town and Country Planning Act, 1947, provides for a new highway to be brought into existence by a quite different method. By this section, a development plan made under Part II of the Town and Country Planning Act, 1947, may *define* land as being the site of a proposed road, or as land required for the widening of an existing road which is of less than "by-law width" (*l*), and also *designate* (*m*) the land as being land to which the section (or its predecessor in the 1947 Act) applies. The county council in a rural district, or the county borough or county district council elsewhere, may then by order *declare* the land to be a private street, and the land is thereupon deemed to have been dedicated as a highway (*n*). Such a highway will not, however, forthwith become maintainable at the public expense, and it may be made up by the appropriate

(*g*) National Parks and Access to the Countryside Regulations, 1950 (S.I. 1950, No. 1066); in these regulations the order above described is termed a "public path order."

(*h*) See para. 1 (d), above.

(*i*) 1959 Act, s. 31.

(*k*) 1959 Act, s. 266.

(*l*) Defined in s. 206 (9) of the 1959 Act.

(*m*) The land must be both defined *and* designated in the plan.

(*n*) It is not clear that there need be any evidence of public acceptance before the way becomes a public highway, in accordance with the normal common law rule; probably not.

local authority as a private street at the expense of the frontagers, in accordance with the appropriate street works code (*o*) as modified by Ministerial Regulations (*p*).

(e) *Adoptions.* Not all "streets" are highways, but if the "street works authority" (*q*) declare a street to be a highway maintainable at the public expense, private street works having been carried out therein to their satisfaction (*r*), the effect of such a declaration is also to make the street in question a highway (*s*). The same observation applies to land defined and designated in a development plan to which section 206 applies (*t*), even if that land was not formerly a "street."

3. Trunk Roads and Special Roads

Every trunk road or special road is a highway, but the Minister may regulate the classes of "traffic" (*u*) that can be permitted to use them—or a particular road—and a special control is maintained over side roads (*w*) and private accesses (*x*). Some comments, therefore, on the powers of the Minister to create these roads—for they are not the direct (*y*) concern of local authorities at all—may not be out of place.

By order made under section 7 (2) (*z*), the Minister may direct that any existing highway, or any highway proposed to be constructed by him, shall be a trunk road. In the case of special roads, these come into existence under schemes made either by the Minister or by a highway authority and confirmed by the Minister (*a*). There is little difference to the private lawyer between a special road and a trunk road, except that the powers of the highway authority to stop up existing means of access apply only to special roads (*b*); in the case of both types of roads, planning permission will be required to make a new access thereto, even for the purposes of what would otherwise be permitted development under the Town and Country Planning General Development Order,

(*o*) See Part IX of the 1959 Act, to be discussed in a subsequent article in this series.
(*p*) Town and Country Planning (Construction and Improvement of Private Streets) Regulations, 1951 (S.I. 1951, No. 2224).
(*q*) See s. 213 (2) of the 1959 Act.
(*r*) *Ibid.*, s. 202.
(*s*) *Ibid.*, s. 37.
(*t*) See sub-para. (d), above.
(*u*) Including pedestrians and animals: see 1959 Act, Sched. IV.
(*w*) *Ibid.*, ss. 9 and 13.
(*x*) Only in the case of special roads: see s. 18.
(*y*) Powers may be delegated by the Minister under s. 10; and a "special road authority" may be a local authority.
(*z*) For procedure, etc., see Scheds. I and II.
(*a*) 1959 Act, s. 11, replacing s. 1 of the Special Roads Act, 1949.
(*b*) s. 18, *ibid.*

1950 (*c*), and in practice such permission may often prove difficult to obtain (*d*).

4. The Stopping Up and Diversion of Highways

Part VI of the 1959 Act is devoted to this subject, but these provisions do not cover all the statute law on the subject still in force. The Committee (*e*) considered the argument that there should be only one simple code of procedure for the stopping up and diversion of highways (especially in the case of footpaths and bridleways), but they considered that such substantial changes in the law would be involved as to take the matter outside their terms of reference and the confines of a consolidating statute.

The various methods by which a highway may be stopped up or diverted are as follows:

(a) *Section 108*, which replaces the complicated procedure of sections 84–93 of the Highway Act, 1835, and thereby makes perhaps the most substantial, and certainly the most useful, alteration in the pre-existing law effected by the 1959 Act. The 1835 Act provisions, even in an uncontested case, involved two applications to the magistrates and one hearing before quarter sessions (*f*). The new section does not apply to trunk or special roads (*g*), but it is in all other respects of general application, and it is the only power which the ordinary landowner can invoke—provided he can persuade the local authority to take action on his behalf—whereby he can secure the stopping up or diversion of a road (*h*) running across his land.

Under this section, the highway authority (*i*) may apply to the local magistrates, on the ground that a particular highway is "unnecessary *or* that it can be diverted so as to make it nearer or more commodious to the public" (*k*), and ask for it to be stopped up or diverted, as the case may be. Notices must first have been given by the applicant authority in accordance with Part I of the

(*c*) S.I. 1950, No. 758; see Sched. I, Part II, para. 1.

(*d*) Discussed in more detail in the next article in this series.

(*e*) *Report of the Committee on Consolidation of Highway Law*, Cmnd. 630 (1959), p. 29.

(*f*) Quarter sessions have always had a special interest in highway matters, a legacy from the days before 1888, when they were responsible in the counties for the general administration of all highway matters.

(*g*) In such a case, the Minister may make an order providing that the road shall cease to be a special road or trunk road (see ss. 14 and 7 (2)).

(*h*) As to footpaths, see sub-para. (b), below.

(*i*) Or the non-county borough or urban district council, with the consent of the county council, in certain cases: see s. 108 (10).

(*k*) These are the grounds which applied to proceedings under the 1835 Act. "Or" in this context does *not* mean "and": *R.* v. *Phillips* (1866) L.R. 1 Q.B. 648, dissenting from *R.* v. *Shiles* (1841) 1 Q.B. 919.

Twelfth Schedule to the Act, and any person to whom such a notice is required to be given will be entitled to be heard on the application before the magistrates. In the case of a diversion, the written consent of every person having a "legal interest" in the land (*l*) over which the highway is to be diverted must be produced to and deposited with the court, and the new highway must be completed to the satisfaction of two magistrates before the "old" highway is stopped up.

The magistrates may—but need not—direct a view of the site by two or more of their number, and their order may provide for the stopping up or diversion of the highway for the purposes of all kinds of traffic, or subject to the reservation of a footpath or a bridleway (*m*). If the highway in question (not being a classified road) is situated in a rural parish, advance notice of the intended application to the magistrates must be given to the local rural district council and to the parish council (*n*), and if a notice of refusal of consent is given by either authority within two months, the application cannot be proceeded with (*o*).

The order of the magistrates, when made, does not require further implementation before it becomes effective (*p*), except by way of the execution of any necessary works, but the order, with a signed plan annexed thereto, must be sent by the clerk to the magistrates to the clerk of the peace for enrolment among the records of quarter sessions (*q*). Part II of the Twelfth Schedule to the Act operates to protect the apparatus of statutory undertakers in, upon, over, along or across a former highway which has been stopped up or diverted under this section.

Section 109 authorises any private individual to invite the appropriate local authority to set the machinery of section 108 in motion on his behalf (and, if they so decide, at his expense); however, if he cannot persuade them to act, he will be powerless and he will not be able to make an application to the magistrates on his own initiative.

(b) *Section 110*, replacing section 43 of the National Parks and Access to the Countryside Act, 1949, provides for a special

(*l*) "Legal interest" is not defined in the Act. Presumably the expression is intended to include an easement, such as a private right of way, and the interest of a leaseholder, but the words are not really apt to include the interest of an owner of a legal estate in fee simple, who was surely not intended to be excluded. Terms of conveyancing art when used in administrative statutes do not always mean what they seem.

(*m*) 1959 Act, s. 108 (3).

(*n*) Or the chairman of the parish meeting in a case where the parish in question has no separate parish council.

(*o*) Refusal of consent is an absolute bar to the application proceeding any further.

(*p*) No application has to be made to quarter sessions as under the 1835 Act.

(*q*) s. 108 (8).

machinery for the stopping up of public footpaths and bridlepaths. An extinguishment order may be made by the local authority (*r*) where it seems to them that it is expedient that the path or way in question should be stopped up, on the ground that it is not needed for public use. The order must be in the prescribed form (*s*), and the procedure of the Seventh Schedule to the 1959 Act must be followed (*t*). If there are objections to the order which are not withdrawn the Minister must make arrangements for a local inquiry, which will be a " statutory inquiry " for the purposes of the Tribunals and Inquiries Act, 1958, and consequently any procedural rules made under section 7A (*u*) of that Act will apply thereto (*w*).

(c) *Section 111* provides for the making of a " public path diversion order " by the local authority, again replacing a section of the National Parks and Access to the Countryside Act, 1949. Here the initiative has to be taken by the owner, lessee or occupier of land crossed by the path or way to be diverted, and it must be shown that it is expedient that the path or way should be diverted for the purpose of *either* securing the efficient use of the land crossed by the path, or of other land held therewith, *or* providing a shorter or more commodious path or way. A diversion may thus be sought in the interests solely of agriculture and good husbandry, but before the Minister confirms the order, he must satisfy himself that the path or way, when diverted, " will not be substantially less convenient to the public " (*x*). The procedure is similar to that applying to a public path extinguishment order.

(d) *Section 114* of the 1959 Act empowers a highway authority (or a private individual subject to a legal duty to repair the highway) to effect a temporary diversion of a highway where they are about to repair or widen the highway. The diversion may be effected onto any land adjoining the highway, other than the site of a house, a garden or enclosed land set apart for building (*y*), and the owner or the occupier's consent need not be obtained, but they will be entitled to compensation in respect of any damage sustained.

(*r*) In the case of a district council, with the consent of the local planning authority: s. 112.

(*s*) National Parks and Access to the Countryside Regulations, 1950 (S.I. 1950, No. 1066).

(*t*) Including the almost Victorian provision that notice of the intended order must be inserted in the *London Gazette*.

(*u*) Added to the 1958 Act by s. 33 of the Town and Country Planning Act, 1959.

(*w*) In the meantime it is anticipated that the Minister will, in relation to these and other inquiries held on highway matters, implement the general recommendations of the Franks Report, in accordance with Circular 9/58 of the Ministry of Housing and Local Government, although strictly this does not appply in the present context.

(*x*) s. 111 (5) of the 1959 Act.

(*y*) There are also certain other exceptions: see s. 114 (2).

(e) *Section 13* gives power to the "special road authority" to stop up or divert any highway that crosses or enters the route of a special road, and similar powers in relation to trunk roads (not being special roads) are given to the Minister by section 9. These powers are exercisable by orders made in accordance with the First Schedule, which contains the usual provisions for notices and local inquiries.

Other post-war statutory powers whereby an existing highway may be stopped up or diverted, outside and not affected by the Highways Act, 1959, are as follows:

(f) *Acquisition of Land (Authorisation Procedure) Act, 1946, s. 3.* This section applies only in respect of land which has been acquired, or is proposed to be acquired, by a public authority by compulsory acquisition under the Act or by agreement in such circumstances that it could have been so compulsorily acquired. If there subsists across such land a public right of way "not being a right enjoyable by vehicular traffic," the Minister of Housing and Local Government may, after holding a public local inquiry if any objections are made to the proposed order and are not withdrawn, make an order extinguishing the rights of the public. No reason has to be given justifying the making of the order, but the Minister must be satisfied *either* that a suitable alternative public right of way has been or will be provided, *or* that the provision thereof is not required. In practice the Minister will make such an order only when he is satisfied the diversion (or the stopping up) is necessary to enable the land to be used for the purpose for which it was, or is to be, acquired.

(g) *Town and Country Planning Act, 1944, s. 23* (*z*). This section confers a power similar to that described in the previous sub-paragraph on the same Minister, in respect of any public right of way (*a*), over any land which has been acquired under section 38 or 40 of the Town and Country Planning Act, 1947, or which has been appropriated for those purposes, and is for the time being held by the local authority (*b*) therefor. Again, no grounds are required to be stated for the making of the order, but the Minister must be satisfied that *either* a suitable alternative has been or will be provided, *or* the provision thereof is not required. The procedure is very similar to that applicable to orders made under section 3 of the 1946 Act (para. (f) above), and it applies also to land acquired

(*z*) As re-enacted in the Eleventh Schedule to the Town and Country Planning Act, 1947.

(*a*) This is *not* confined to footpaths and bridleways.

(*b*) *i.e.*, the county borough or county district council, in accordance with the terms of the development plan.

by a new town development corporation under the New Towns Act, 1946, by virtue of section 6 (1) (b) of that Act.

(h) *Town and Country Planning Act, 1947, s. 49*, empowers the Minister of Transport and Civil Aviation to make an order authorising the stopping up or diversion of any highway (*c*) where he is satisfied that it is necessary so to do in order to enable development to be carried out in accordance with planning permission granted under Part III of the 1947 Act, or to be carried out by a Government Department. The procedure for making the order is regulated by the Sixth Schedule to the 1947 Act, and the proceedings may be taken concurrently with proceedings for the compulsory acquisition of land required to provide or improve any highway substituted in lieu of the highway to be stopped up or diverted (*d*).

(i) *The Civil Aviation Act, 1949, s. 28*, gives power to the Minister of Transport and Civil Aviation "where he is satisfied that it is necessary so to do in order to secure the safe and efficient use for civil aviation purposes, including the testing of aircraft designed for civil aviation," of any land vested in him or the Minister of Supply or which it is proposed to acquire, to authorise by order the stopping up or diversion of any highway. There are the usual procedural provisions as to notice, and any order made under this section is subject to special parliamentary procedure under the Statutory Orders (Special Procedure) Act, 1945.

(j) *The Diseases of Animals Act, 1950, s. 11*, empowers the Minister of Agriculture, Fisheries and Food to make orders which may, *inter alia*, regulate the movement of animals and persons into, within or out of an "infected area," and such an order may have the effect temporarily of closing a highway. A similar power to close a highway temporarily for repairs will be found in section 47 of the Road Traffic Act, 1930 (as amended by the Public Utilities Street Works Act, 1950, and the Road Traffic Act, 1956).

(k) *The Housing Act, 1957, s. 64*, enables a local authority (*e*), with the approval of the Minister of Housing and Local Government, to make an order extinguishing any public right of way over land purchased by them under Part III of the Housing Act,

(*c*) This is a general power, which may be exercised as an alternative to other powers. An order made under the section may override a local Act: *Harlow* v. *Minister of Transport* [1951] 2 K.B. 98.

(*d*) See the Stopping up of Highways (Concurrent Proceedings) Regulations, 1948 (S.I. 1948, No. 1348).

(*e*) *i.e.*, the housing authority—a borough or a district council.

1957, or its predecessors (the "slum clearance" provisions) (*f*); if the land was acquired under Part V of the 1957 Act for normal housing development, the somewhat more restricted powers of section 3 of the Acquisition of Land (Authorisation Procedure) Act, 1946 (see para. (f) above), alone will be available to the local authority.

(l) *The Land Powers (Defence) Act, 1958, ss. 8 and 9*, contain powers enabling the Minister of Transport and Civil Aviation to use section 49 of the Town and Country Planning Act, 1947 (*g*), so as to stop up or divert a highway where land over which it runs is to be used by a Minister "for the purposes of an installation provided or to be provided for defence purposes, or is used by a manufacturer of aircraft as an airfield wholly or mainly in connection with the manufacture of aircraft for defence purposes," *provided* he is satisfied that the stopping up or diversion is necessary to enable the land to be so used efficiently without danger to the public. Section 9 extends existing powers to stop up or divert a highway in pursuance of "emergency powers," conferred by sections 15 and 16 of the Requisitioned Land and War Works Act, 1945.

(m) *The Opencast Coal Act, 1958, s. 15*, extends the procedure of section 3 of the Acquisition of Land (Authorisation Procedure) Act, 1946 (see para. (f) above) to the "suspension" (as distinct from extinguishment) of public rights of way that are not capable of being enjoyed by vehicular traffic, over land which is the subject of an application by the National Coal Board for an authorisation from the Minister of Power to work coal by opencast operations (*h*); the Minister who in such a case makes the order under the 1946 Act procedure is the Minister of Power, but in all other respects the procedure of that Act as above mentioned will apply.

5. The Effect of Stopping Up

"Once a highway always a highway," and therefore an existing highway can be stopped up or diverted only under express statutory authority as above described. Where a stopping-up order (and a diversion order has the effect of stopping up that portion of the "old" highway that is diverted) has become effective under one or other of these statutory provisions, the rights of the public

(*f*) The usual procedure, and prescribed forms, will be found in the Housing Act (Extinguishment of Public Rights of Way) Regulations, 1937 (S.R. & O. 1937, No. 79) (made under the Housing Act, 1936).
(*g*) See para. (h), above.
(*h*) Under s. 1 of the Act of 1958.

to pass and repass along the " old " highway are destroyed, and the " top crust " of the highway that was vested in the highway authority (*i*) (in the case of a highway maintainable at the public expense) once again becomes the property of the person on whose land the highway was constructed, or his successors in title (*k*). If the highway authority had acquired the land under their powers to construct a highway (*l*), it would seem that the land itself will still belong to them (*m*), freed from the rights of the public over it.

Most of the statutes providing for the stopping up and diversion of highways contain elaborate provisions designed to safeguard the apparatus of " statutory undertakers " (*n*) under, in, upon, over, along or across the stopped-up portion of the highway (*o*). In most cases the undertakers have the same rights in respect of the apparatus as if the order had not been made and they can therefore leave their apparatus *in situ*, except that the authority who applied for the stopping-up order may require the undertakers to remove the apparatus, at the authority's expense.

Where a highway is diverted, it is normally considered to be the duty of the highway authority or other person obtaining the diversion (*p*), to fence off the old highway at the point of the diversion or stopping up, or to take other proper precautions in order to avoid injury to users of the diverted highway acting without negligence on their part (*q*).

Where a private right exists over what was formerly a public right of way or highway, the private right will not be affected by the stopping up or diversion of the public right; " it is clear law that there may be a private right of way along a road and a public right of way existing at the same time " (*r*); the lesser right is not merged in the greater.

(*i*) See the first article in this series.

(*k*) *Rolls* v. *St. George the Martyr, Southwark, Vestry* (1880) 14 Ch.D. 785.

(*l*) Under, for example, s. 213 (2) of the Highways Act, 1959.

(*m*) If, however, the land was specifically given or demised to the highway authority for highway purposes, there may be a reversion to the grantor in cases where the land is no longer used as a highway, and as to restrictions in certain cases, see s. 225 of the 1959 Act.

(*n*) See the definition in s. 295 (1) of the 1959 Act.

(*o*) As is provided in Part II of the Twelfth Schedule to the 1959 Act, in relation to orders made under s. 108 thereof; in the case of orders made under s. 3 of the Acquisition of Land (Authorisation Procedure) Act, 1946, the consent of any statutory undertakers concerned has to be obtained.

(*p*) Such as the Minister of Transport and Civil Aviation under s. 49 of the Town and Country Planning Act, 1947.

(*q*) As in a case where a lady wandered off the diverted path in the dark, along the route of the old path: *Hurst* v. *Taylor* (1885) 14 Q.B.D. 918.

(*r*) *Per* Denning L.J. (as he then was), in *Walsh* v. *Oates* [1953] 2 W.L.R. 835, at p. 839.

Any footpaths or bridleways that are stopped up or diverted should be deleted from the definitive map and statement on the quinquennial review held by the county council under the National Parks and Access to the Countryside Act, 1949 (*s*).

(*s*) See above, para. 1 (d). This procedure will afford any person aggrieved an opportunity of alleging that the particular procedure of stopping up (or diversion) was not correctly followed or was *ultra vires* in the particular case.

FORFEITURE BY DISCLAIMER

By J. A. Andrews, B.A., B.C.L.(Oxon)

The recent case of *Warner* v. *Sampson & Another* (*a*) has once more brought to life a comparatively dormant part of our law—that relating to forfeiture of a lease on denial of the landlord's title. The facts are somewhat involved and for this reason they are set out at length.

The premises in question had been demised for a term of 99 years from June 1900. The term became vested in a Mrs. Sampson and the reversion eventually vested in Mrs. Warner, the plaintiff. Mrs. Sampson died in 1949, having bequeathed the premises to her executors, Mr. Arthur Sampson and a Miss Gandy, on trust. The rent fell into arrears and Mrs. Warner served a notice of breaches of covenant on each of the executors in January 1955. The executors appear to have done little to rectify the situation and in April 1955 a writ was issued. This was served on the first defendant on May 4. On May 27 judgment in default of appearance was signed against the first defendant.

On June 15, the defence of the second defendant was delivered. The defence was as follows:

"Defence of the second defendant: 1. This defendant admits that she was appointed an executrix of the will of Gertrude Annie Sampson, deceased, as alleged in paragraph 8 in the statement of claim. 2. This defendant denies she has committed the breaches of covenant specified in paragraph 9 of the statement of claim or any breach of any covenant. 3. Save and except for the admission herein contained, this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed *seriatim*" (*b*).

On June 29 the reply of the plaintiff was delivered. The plaintiff pleaded that, since the second defendant's defence disputed her title, she thereby exercised her right to forfeit the term demised by the lease. On August 26 Master Grundy made an order setting aside the judgment against the first defendant and giving leave to the

(*a*) [1958] 1 Q.B. 404 (Ashworth J.) and [1959] 1 Q.B. 297 (C.A.).

(*b*) Counsel and solicitors who appeared for the defendants were not responsible for this pleading and the law reports contain no mention of the name of the counsel who drafted and signed it.

second defendant to withdraw her defence. On appeal by the plaintiff Pearson J. varied Master Grundy's order by giving leave to the second defendant to amend—but not to withdraw—her defence.

The subsequent facts were briefly that the first defendant delivered his defence, the second defendant delivered her amended defence and the reply of the plaintiff claiming that the lease was forfeited by the denial of her title in the original defence was delivered. The plaintiff died in November 1956 and the proceedings were continued by her administratrices.

The case came first before Ashworth J., who held on the authority of *Simpson* v. *Gutteridge* (*c*) that the denial of the landlord's title by one executor was as effectual as if both had joined in it (*d*). He further held that the second defendant was bound by her original defence, since the pleading evidenced forgetfulness rather than mistake (*e*), and he also decided that the traverse was sufficiently clear and unambiguous to form the basis of a forfeiture (*f*).

It will be remembered that paragraph 2 of the defence denied the commission of breaches of covenant. It might well be argued that paragraph 2 in denying the commission of breaches of covenant only makes sense if the defence contemplates a valid lease containing those covenants. But a denial of breach of covenant can be based on two grounds, either the non-existence of the act constituting a breach or the non-existence of the covenant, as would be the case if a valid lease had never been granted. Ashworth J., whilst referring to paragraph 2, relied on the very clear wording of paragraph 3, which apart from the admission in paragraph 1—as to the defendant's executorship—specifically denied each and every allegation in the plaintiff's statement of claim. One fundamental element of the statement of claim was, of course, the title of the landlord, without which she could show no valid lease and make no claims on the tenants. Furthermore, of course, the second defendant's conduct in seeking to withdraw her defence showed that she herself well recognised the danger of her first pleading.

Few people will regret the Court of Appeal decision (*g*), which reversed the judgment of Ashworth J. This is no criticism of the

(*c*) (1816) 1 Madd. 609. "... several executors are considered only as one, and a gift, sale, surrender, payment, release, or judgment confessed by one executor is as effectual as if all of them had joined." *Per* Sir Thomas Plumer V.-C. at p. 616. Ashworth J. noted that the Administration of Estates Act, 1925, s. 2 (2), requires a conveyance of real estate to be made with the concurrence of all personal representatives and s. 55 defines conveyance so as to include a "disclaimer," but he held that the defence of the second plaintiff was not a disclaimer within the meaning of s. 55.

(*d*) [1958] 1 Q.B. 404, at pp. 419, 420.

(*e*) [1958] 1 Q.B. at p. 417.

(*f*) *Ibid.*, at p. 416.

(*g*) [1959] 1 Q.B. 297.

latter's judgment—he was probably bound by the authority of an earlier decision of Farwell J. in *Kisch* v. *Hawes Bros., Ltd.* (*h*). The Court of Appeal were not so bound and took the opportunity of criticising the decision in *Kisch's* case and overruling it. They held the landlord was not entitled to possession of the premises by way of forfeiture for denial of title for two reasons. The first reason, and here Lord Denning and Hodson and Ormerod L.JJ. all concurred, was that the general traverse in the defence of the second defendant only put the landlord to proof, and did not give rise to a forfeiture. It did not amount to an assertion that the title to the reversion was in the tenant or a stranger. The use of a general traverse in one form or another by pleaders is very common. When a pleader wishes to put the plaintiff to the proof of matters averred in the statement of claim they can use the general form "The defendants do not admit" or "The defendants deny." The two forms are commonly believed to have a similar effect. They put the plaintiff to proof rather than make any positive averment on behalf of the defendant.

The second reason for denying the landlord her forfeiture was given by Hodson and Ormerod L.JJ. Even supposing that the general traverse amounted to a denial of the landlord's title, the forfeiture did not arise until the landlord either re-entered or issued a writ for possession. The landlord had not re-entered before permission to amend the defence was obtained. Admittedly on June 29, 1955, the plaintiff delivered her reply to the second defendant's defence, and paragraph 3 of her reply stated: "The plaintiff hereby exercises her said right to forfeit the said term, and claims to be thereby entitled to re-enter upon the said premises," but such a reply without the issue of a writ was insufficient to complete the re-entry. Between the original defence and the amended defence nothing was done by the plaintiff to claim possession of the premises other than the words in paragraph 3 of her reply. Once the defence is lawfully amended it supersedes the original defence and takes its place on the record as part of the pleadings. No writ having been issued before the amendment, the plaintiff had no claim, since thereafter the plaintiff's title was admitted on the record.

It is often said to be a general principle of English law that a tenant shall not be allowed to deny his landlord's title. By his action in making a tenancy agreement he is estopped from making any disclaimer of title. If he does deny his landlord's title then the lease becomes forfeit at the landlord's option.

(*h*) [1935] Ch. 102.

The principle has a long history. In *Warner* v. *Sampson and Another*, on appeal (*i*), Lord Denning traced it as far back as Glanvill, who says:

> "A Vassal cannot injure his Lord consistently with the Faith implied in Homage; unless, possibly, in his own defence, or unless, in compliance with the King's precept, he join his Army when it proceeds against his Lord; and, generally speaking, no one can by Law, consistently with the Faith implied in Homage do anything which tends to deprive his Lord of his Inheritance, or affix a personal stain upon him. . . . From what has gone before it is evident that if a Tenant should do any thing to the disinherison of his Lord, and should be convicted of it, he and his Heirs shall according to the Law for ever lose the Fee held of such Lord" (*k*).

The early history of this doctrine is not of immediate concern. The Court of Appeal in *Warner* v. *Sampson* gave considerable citation of early academic authority and the principle can be traced through the early treatises on English law (*l*). But it might be pointed out that there is a considerable difference in the nature of the tenant's duties under the feudal principle and under modern law. Glanvill is basing his arguments on the oath of fealty between lord and tenant. There arise out of this oath certain personal duties, so that if "the Chief Lord should command the Tenant to accompany him in person against another of his Lords, he ought to yield obedience to his mandate, saving however the service due to the other Lord for the fee held of him" (*m*). The modern rule would seem to be based not on any personal duty such as fealty or homage but on the principle that the tenant cannot both deny and aver his landlord's title. If once he questioned that title, then why should he be allowed to aver that title in a subsequent action to defend his tenancy? If he denies the landlord's title, then he denies his own tenancy (*n*).

In the time of Coke (*o*) it appears that forfeiture might result in

(*i*) [1959] 1 Q.B. 297, pp. 312 *et seq.*

(*k*) Glanvill, Book IX, ch. 1. (Beames's Translation, 1812, pp. 219, 220; Woodbine's edition, p. 125.)

(*l*) See, for example, Fleta L.3., c. 16; Bacon's *Abridgement*, *Leases*, T.2.

(*m*) Glanvill, Book IX, ch. 1. (Beames's Translation, 1812, p. 220; Woodbine's edition, p. 125.)

(*n*) It has long been recognised that a tenant is estopped from disputing the title of the landlord by whom he was let into possession, or whom he has acknowledged by payment of rent. This rule and the forfeiture rule are to some extent complementary to each other, but they should not be confused. The one prevents the tenant from giving evidence to show his landlord's lack of title. The second rule implies a sanction when he has denied his landlord's title. If he does make a disclaimer his term is forfeit at the landlord's option.

(*o*) Coke, *Commentary upon Littleton*, pp. 251 b, 252 a.

two ways. The forfeiture might be *in pais* where the lands and tenements lay in livery and where the tenant by livery of seisin passed a greater estate than he could lawfully make. No forfeiture lay for any estate which lay in grant, and if the tenant granted by deed an interest larger than that which he could lawfully convey nothing more passed than he could lawfully pass and there was no forfeiture. This mode of forfeiture is of no significance since the abolition of conveyance by livery of seisin.

The second manner of forfeiture was by record. The tenant could incur a forfeiture by record in three ways: "First, by alienation. Secondly, by claiming a greater estate than he ought. Thirdly, by affirming the reversion to be in a stranger" (*p*). All these acts must take place in a court of record (*q*).

Forfeiture by alienation was only possible under the old practices of levying a fine or suffering a common recovery by the tenant for life and is of no significance today. That leaves two possibilities whereby the tenant might find his estate forfeit for denying his landlord's title, *viz.*, claiming a greater estate than he has or affirming that the reversion or remainder is in a stranger, and both must be in a court of record.

Mathew Bacon in his *Abridgement* agrees with Coke's statement of the law (*r*). He makes at first a very broad generalisation:

> "Here it is to be observed, that any act of the lessee by which he disaffirms or impugns the title of his lessor occasions a forfeiture of his lease. For to every lease the law tacitly annexeth a condition, that if the lessee do any thing that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter. Besides, every such act necessarily determines the relation of landlord and tenant; since to claim under another, and at the same time to controvert his title; to affect to hold under a lease, and at the same time to destroy that interest out of which the lease ariseth, would be the most palpable inconsistency."

The rest of the title goes on to relate when a forfeiture may occur. It occurs either by act *in pais* or by matter of record. Forfeiture by an act *in pais* is restricted to the one case of a conveyance which displaces the reversioner's estate that is a feoffment with livery. It would appear from the early authorities that the rule that a tenant commits forfeiture if he disclaims his landlord's title was never a general rule after the breakdown of the medieval

(*p*) *Ibid.*, pp. 251 b, 252 a.
(*q*) *Supra*, n. (*p*).
(*r*) Bac. Abr. tit. *Leases and Terms of Years.* (T.2.)

structure. Whilst it finds its origins in the peculiar personal relationship of lord and tenant in the Middle Ages, it differs considerably from that medieval rule. Probably by Littleton's time and certainly by Coke's time the operation of the forfeiture rule was strictly confined to some four acts whereby the tenant expressly or impliedly denied his landlord's title. These have now been whittled down to two.

There is conclusive authority for saying that an oral denial of the landlord's title does not cause forfeiture of a lease (*s*). Neither will refusal to pay rent or payment of rent to another amount to a disclaimer (*t*). In *Doe* d. *Graves* v. *Wells* (*u*) Lord Denman C.J. confined the determining effect of the disclaimer to those cases where "the tenant has betrayed his landlord's interest by an act that might place him in a worse condition" or where the disclaimer is upon record (*w*). He also noted that the expression forfeiture or disclaimer had been improperly applied to a lessee from year to year. In these cases of determination of tenancies from year to year the evidence of a disclaimer of the landlord's title by the tenant operates as evidence of the determination of the tenancy by the will of both parties. The tenant's intention being evidenced by his disclaimer, the landlord's intention being evidenced by his bringing an action to recover possession, the term is determined without any notice being given. This principle really depends on the particular nature of the tenancy. In more modern language the disclaimer can be said to "operate as a waiver by the tenant of the usual notice to quit" (*x*).

(*s*) *Doe* d. *Graves and Downes* v. *Wells & Trowbridge* (1839) 10 Ad. & E. 427. A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. See also *Rees* d. *Powell* v. *King and Morris* (1800) Forrest 19.

(*t*) *Doe* d. *Dillon* v. *Parker* (1820) Gow 180; *Doe* d. *Gray* v. *Stanion* (1836) 1 M. & W. 695; *Doe* d. *Williams* v. *Pasquali* (1793) Peake 259. The last-named case is not conclusive authority since the tenant merely refused to pay rent to a devisee in a will which was contested and accompanied his refusal with a declaration that he was prepared to pay rent to any person entitled to receive it.

(*u*) *Supra*, n. (*s*).

(*w*) *Ibid.*, at p. 435.

(*x*) Woodfall, *Landlord & Tenant*, 25th ed. by Blundell, p. 1072. See also *Doe* d. *Calvert* v. *Frowd* (1828) Bing. 557 *per* Best C.J. at p. 560: "A notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence"; *Doe* d. *Bennett* v. *Long* (1841) 9 C. & P. 773 *per* Coleridge J. at p. 776: "You might recover your property from him by an ejectment, although you have given no notice to quit"; *Vivian* v. *Moat* (1881) 16 Ch.D. 730 *per* Fry L.J. at p. 734 where he held "there was that renunciation or disclaimer of the landlord's title which precluded the necessity of proving a valid notice to quit." There is indeed a vast number of cases to the same effect including *Doe* d. *Grubb* v. *Grubb* (1830) 10 B. & C. 816; *Doe* d. *Gray* v. *Stanion* (1836) 1 M. & W. 695; *Doe* d. *Jefferies* v. *Whittick* (1820) Gow 195; *Doe* d. *Phillips* v. *Rollings* (1847) 4 C.B. 188; *Doe* d. *Davies* v. *Evans* (1841) 9 M. & W. 48; and *Doe* d. *Landsell* v. *Gower* (1851) 17 Q.B. 589.

There would appear to be only one case between 1590 and 1934 in which a disclaimer of the landlord's title operated as a forfeiture. The case is *Doe* d. *Ellerbrock* v. *Flynn* (*y*).

B granted a lease to T in 1828 for five years. Later Flynn applied to T stating the premises were his, and T admitted Flynn into possession. It was found that T admitted Flynn into possession with the intention of enabling him to set up his hostile title, not with the intention that he should hold under the lease. It was held that the lease was forfeit. In so far as the conduct of the tenant was a fraud on his landlord the case is supportable. The judgment of Lord Lyndhurst C.B. makes no specific mention of fraud, but a jury had found that possession was delivered up "in fraud of the landlord." Counsel for the plaintiff seems to have relied on the general principle laid down by Bacon in his *Abridgement* (*z*), but, as we have shown above (*a*), this general principle was not recognised as a rule of law even by Bacon himself. It was merely a loose generalisation of a limited number of ways in which a lease might become forfeit by disclaimer. A further reading of Bacon might have persuaded counsel that that authority, far from supporting his case, needed to be overcome before he could succeed. Perhaps further study might have prompted Lord Lyndhurst to a more exhaustive consideration of the law. As it is, his judgment (5 lines) offers no analysis of the rules, but merely states:

> "If the tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term; and it is the same if he assists another person to set up such a claim" (*b*).

Lord Denman in *Doe* d. *Graves* v. *Wells* thought that the authority of *Doe* d. *Ellerbrock* v. *Flynn* was confined to those cases "where the tenant had betrayed his landlord's interest by an act which might place him in a worse condition." He went on to say, "if the case went further than that, I should not think it maintainable" (*c*).

The possibility of forfeiture for disclaimer *in pais* was recently considered by the Court of Appeal in *Wisbech Parish Council* v. *Lilley* (*d*). A tenant of the parish council sold whatever interest he had in his cottage to Lilley. During negotiations the vendor claimed to have owned the cottage for some forty years and never

(*y*) (1834) 1 C.M. & R. 137.
(*z*) Bac. Abr., *Leases*, T.2.
(*a*) *Supra*, p. 291.
(*b*) (1834) 1 C.M. & R. 137, at p. 141.
(*c*) (1839) 10 Ad. & E. 427, at p. 435.
(*d*) [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.

to have paid rent. In an action against the tenant's assign, Lilley, the council claimed the lease to be forfeit, relying on *Doe* d. *Ellerbrock* v. *Flynn*. The Court of Appeal refused to follow the broader rule in that case and held that the transaction was not aimed at allowing Lilley to set up a hostile title. They went further and stated that it was " somewhat dangerous to allow an interest at law to be put an end to by mere words " (*e*).

Apart from *Doe* d. *Ellerbrock* v. *Flynn* there would appear to be only one other case since 1590 in which a disclaimer operated as a forfeiture (*f*). In this case the disclaimer was on record. The case is *Kisch* v. *Hawes Bros., Ltd.* (*g*). The facts bear great similarity to *Warner* v. *Sampson*. A tenant for life granted a lease of certain premises to the defendants. After the death of the grantor her successor sued for possession. The defendants pleaded possession under Order 21, r. 21. Under this Order any defence that the defendant is in possession operates to imply into that statement that the defendant " denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim." This amounted to a denial of title, since the plaintiff's title was essential to her statement of claim. Farwell J., despite having given leave to the defendants to amend their defence, held the plaintiff became entitled to forfeit the lease as soon as the original defence was delivered (*h*). He reached his decision on this point in six lines. The Court of Appeal have recently taken fifteen pages to overrule him.

It would appear that with the exception of *Doe* d. *Ellerbrock* v. *Flynn* and *Kisch* v. *Hawes Bros., Ltd.* the principle of forfeiture by disclaimer has not been successfully invoked since 1590. When one appreciates that the latter case has properly been overruled one may rightly ask whether it would not have been better if the principle had lapsed altogether. Further it can be argued that the Court of Appeal in *Warner* v. *Sampson* might have taken the bull by the horns and not only declared the rule to be archaic and founded on feudal principles but to be entirely inapplicable in modern law. The court might well heed the dictum of Lord Atkin: " When these ghosts of the past stand in the path of justice

(*e*) [1956] 1 W.L.R. 121, at p. 125, *per* Sir Raymond Evershed M.R.

(*f*) The case in 1590 is *Sir William Pelham's Case* (1590) 16 Rep. 146; 2 Leon. 3. Coke argued unsuccessfully that no forfeiture had been incurred. Before *Pelham's Case* there were other cases on the subject. They are mentioned by Lord Denning in *Warner* v. *Sampson* [1959] 2 W.L.R. 109, at pp. 117 and 118.

(*g*) [1935] Ch. 102.

(*h*) In *Barton* v. *Read* [1932] 1 Ch. 362 the same mistake was made by counsel who drafted the original defence. The defence simply stated that the lessee and an under-lessee were in possession by themselves or their tenants (Ord. 21, r. 21). Here the plaintiffs agreed before the hearing to waive the forfeiture and the point was never brought up for discussion in court: see [1932] Ch. 362, at p. 367.

clanking their medieval chains, the proper course for the judge is to pass through them undeterred " (*i*). Here, if anywhere, is a ghost clanking—if that is not too strong a word for a ghost which has only two successful hauntings to its name since 1590—its medieval chains. Despite this the judges have never passed through it Lord Atkinwise. They have preferred to fall over backwards in holding that the particular words did not amount to a disclaimer (*k*). So Romer L.J. expressly accepted the principle in *Wisbech P. C.* v. *Lilley*:

" I accept, however, counsel's submission that, even now, if a tenant deliberately asserts a title in himself adverse to his landlord or if he lets a stranger into possession with the intention of enabling him to set up a title adverse to the landlord, that amounts to a repudiation of his landlord's title and it would seem that where the tenancy in question is a yearly tenancy it is sufficient if the assertion of title against the landlord is made orally " (*l*).

Certain observations might be made on this dictum. First, forfeiture by disclaimer has not been a general principle of English law since the decline of the feudal system. It has been pointed out above (*m*) that even Coke and Bacon confined its operation to certain specific acts of denial. Further, of the heads of forfeiture recognised by these authors, only forfeiture by disclaimer on record would seem to be applicable to modern law. Secondly, forfeiture by disclaimer *in pais* would seem to have been established as a rule of law by *Doe* d. *Ellerbrock* v. *Flynn* but would appear to be confined to those cases where the tenant's conduct is in some way fraudulent or, if we want to use a more neutral word, reprehensible. Thirdly, assertions of title against the landlord made by a yearly tenant do not operate to terminate the tenancy by forfeiture but merely constitute a waiver of the necessary period of notice to quit such a tenancy (*n*).

Nevertheless there is something to be said for not repudiating the principle entirely. It seems wholly just that a tenant who fraudulently denies his landlord's title in order to establish that title in himself or in a third party should have no defence to the landlord's subsequent forfeiture of the lease. Nor does it seem

(*i*) *United Australia, Ltd.* v. *Barclays Bank Limited* [1940] 4 All E.R. 20, at p. 37.

(*k*) *e.g.*, *Doe* d. *Williams* v. *Pasquali* (1793) Peake 259; *Doe* d. *Dillon* v. *Parker* (1820) Gow 180; *Doe* d. *Lewis* v. *Cawdor* (1834) 1 C.M. & R. 398; *Doe* d. *Gray* v. *Stanion* (1836) 1 M. & W. 695; *Wisbech P. C.* v. *Lilley* [1956] 1 W.L.R. 121; *Warner* v. *Sampson* [1959] 2 W.L.R. 109.

(*l*) [1956] 1 W.L.R. 121, at p. 126.

(*m*) *Supra*, p. 291.

(*n*) *Supra*, n. (*x*).

necessary to make any distinction between disclaimer *in pais* or on record provided that it can be shown that the tenant's object was to deprive the landlord of his lawful title, and that the claim of the tenant is not a bona fide one.

It might be argued that the landlord's position will be extremely tenuous if the tenant is freely allowed to make denials of his, the landlord's, title. Such argument overlooks the well-established rule of evidence that the tenant is estopped from denying his landlord's title. Any evidence he might wish to give will not be received and any denials he has made or wishes to make are not admissible as evidence (*o*).

To deprive a tenant of his term merely because he has inadvertently, recklessly or, worse still, honestly and in good faith, made a denial of his landlord's title would seem to be contrary to the rules of justice. To go further as the court did in *Kisch* v. *Hawes Bros., Ltd.*, and deprive him of his term because of an unfortunately drafted defence is indefensible, particularly when a very learned Lord of Appeal in Ordinary has admitted to frequently using the plea of " possession " in his junior days. That same Lord of Appeal pointed out that he would have been shocked to find that he had thereby involved his client in a forfeiture (*p*). In view of this one cannot help but feel sympathy for the unfortunate counsel in *Kisch* v. *Hawes Bros., Ltd.*, and *Warner* v. *Sampson* who respectively involved their clients in a forfeiture and a long lawsuit.

The law relating to forfeiture by disclaimer has undoubtedly and justifiably fallen into disrepute. Either the doctrine should be overridden by the judges or, and this would be the better course to take, it should be reconstructed on modern lines. This could be done by abolishing the distinction between disclaimer *in pais* and on record, if indeed any distinction still exists, and confining operative disclaimers to those denials of title which a tenant makes with a view to aiding some unlawful interference with his landlord's title.

(*o*) See Phipson, *Law of Evidence*, 9th ed. by Burrows, at p. 708; Woodfall, *Landlord and Tenant*, 25th ed. by Blundell, at pp. 15 *et seq.* See also *Cooke* v. *Loxley* (1792) 5 T.R. 4; *Cooper* v. *Blandy* (1834) 1 Bing.N.C. 45; *Delaney* v. *Fox* (1856) 1 C.B.(N.S.) 166; *Lewis* v. *Morelli* [1948] 2 All E.R. 1021; *Mackley* v. *Nutting* [1949] 2 K.B. 55.

(*p*) Lord Denning in *Warner* v. *Sampson* [1959] 1 Q.B. 297 at p. 311.

THE HOUSE PURCHASE AND HOUSING ACT, 1959

The House Purchase and Housing Act, 1959, which received the Royal Assent on May 14 and came into force on June 14, represents the outcome of the present Government policy of improving those older houses which are capable of being brought up to a reasonable standard and still have a period of useful life and of enabling more persons to join the class of house-owners. The provisions of the Act fall under three main heads: (i) The Treasury is empowered to make regulations for designating certain building societies as bodies in which trustees may invest. (ii) The Government is empowered to make funds available to building societies for advances on certain pre-1919 houses. (iii) The law relating to improvement grants is amended so as to make them more widely available. Heretofore, the making or withholding of grants has been in the discretion of the local authority. A new type of grant, the standard grant, has been introduced which an owner is entitled to demand as of right. Standard grants are for the purpose of bringing houses without the standard amenities up to a minimum standard.

1. Building Societies with Trustee Status

Although the vast majority of building societies are of the soundest financial standing and repute, there is still a number of black sheep in which no well-advised person, let alone a trustee, would put his money. Hence the need for differentiation. Presumably, even where a building society is sound it will, as a matter of prestige, try to achieve trustee status by complying with the requirements referred to in the Act. By section 1 the Treasury may by regulations prescribe requirements as to the assets and liabilities, liquid funds, reserves and other matters of permanent building societies (*a*). The Chief Registrar of Friendly Societies (who is *ex officio* registrar of building societies) may then designate the building societies which fulfil these requirements and they will then have trustee status. Trustees are thereby empowered to invest funds of trusts by depositing with the society amounts not exceeding £5,000 for any one trust, and the Trustee Act, 1925, s. 1, is extended accordingly. In the case of Northern Ireland, the

(*a*) The regulations have been made: Designation for Trustee Investment Regulations, 1959 (S.I., No. 1010).

Registrar for Northern Ireland has the duty of designating building societies.

Designations may be revoked. Notices of designation and revocation will be published in the *London Gazette*. The figure of £5,000 may be varied by the Treasury from time to time.

This section is now in full force and a number of societies has been designated.

2. Exchequer Advances to Building Societies

General practitioners will not be concerned with the detailed arrangements between the Government and the building societies for the making of exchequer advances, but they are concerned with the conditions with which building societies must comply. Only building societies of trustee status can participate in the scheme (*b*). The conditions of the advances are as follows: the advances apply to the purchase or improvement of houses built before 1919 of an estimated value of £3,000 in the Metropolitan Police District or £2,500 elsewhere. The value is to be that of the fee simple absolute in possession free from incumbrances. The Minister is given power to vary the conditions (*c*).

There will be agreements between the Government and the building societies concerned laying down further conditions as between the Government and the building societies. The most important of these are: (i) the advance, if the borrower so wishes, is to be 95 per cent. of the purchase price or valuation (whichever is the less); (ii) the rate of interest is not to exceed the minimum rate recommended for the time being by the Building Societies Association for new mortgages for private houses for owner-occupation; (iii) no premium or any other charge shall be payable to the society by a borrower as consideration for the advance. The provisions of section 2 are confined to pre-1919 houses, but, as a matter of good faith, building societies have agreed to grant similar facilities to 1919–1940 houses, assuming, of course, the purchaser is creditworthy and the house suitable security.

3. Improvement Grants

Standard Grants

Heretofore the making of improvement grants has been entirely within the discretion of the local authority: if it decided as a matter of policy not to make grants that was an end of the matter. Sections 4 to 6 confer a right to a grant for the provision of

(*b*) s. 1 (1) (b).
(*c*) s. 2.

standard amenities. The grant is limited to one-half of the cost of the improvements subject to a maximum of £155 if all the statutory amenities are provided by the work. It is a condition of the grant that on completion of the work all the amenities shall exist. If some of the amenities are already there and do not need replacement, the grant is reduced appropriately.

The standard amenities and their statutory tariff are as follows:

	£
(a) a fixed bath or shower in a bathroom	25
(b) a wash-hand basin	5
(c) a hot-water supply	75
(d) a water closet in or contiguous to the dwelling	40
(e) satisfactory facilities for storing food	10
	£155

The amenities must be provided for the exclusive use of the occupants of the dwelling. The proposed works must be approved before they are begun and must be executed to the satisfaction of the local authority. Standard grants are confined to dwellings erected before 1945 or brought into existence by conversion before 1959. The local authority must be satisfied that, after execution of the works, the dwelling will have a useful life of at least fifteen years. The applicant must either own the fee simple or a term of at least fifteen years. The provisions relating to improvement grants generally apply to standard grants with the necessary modifications.

Improvement Grants Generally

There is a number of modifications of the provisions relating to improvement grants generally:

(i) The Housing (Financial Provisions) Act, 1958, s. 31 (3), provided that an applicant with a leasehold interest had to have a term with not less than thirty years unexpired. This is reduced to fifteen years (*d*).

(ii) Certain conditions with regard to availability for letting and the maximum rent to be charged have up till now been effective for twenty years. The period is reduced to ten. These conditions might be released by the local authority subject to payment of

(*d*) s. 10.

an appropriate proportion of the grant, but it was in the discretion of the authority. The owner is now entitled to redeem his property whether the authority approve or not. Another important relaxation of conditions entitles an applicant to sell his property with vacant possession after three years without having to repay the grant (*e*).

(iii) An applicant may now, when he makes his application, ask the local authority to fix a rent higher than the rent limit imposed by the Rent Act, 1957, s. 20, where the dwelling is not subject to a controlled tenancy (*f*).

(iv) Where a local authority refuse a maximum grant, the applicant can require them to state in writing their reasons for refusal (*g*).

(*e*) s. 11.
(*f*) s. 12.
(*g*) s. 9.

THE NEW NATIONAL CONDITIONS OF SALE

Nearly all solicitors either use the Law Society's Conditions of Sale or the National Conditions of Sale. At one time the latter had the reputation of being more favourable to the vendor, but it is doubtful whether this is true any longer, and today the selection is almost entirely a matter of taste, if not mere conservatism. When Dr. Walford considered the sixteenth edition (*a*) he objected strongly to the provision that a vendor not in default should pay an occupation rent in case of delay in completion. This trap has now disappeared. The provision with regard to giving notice to complete (which was defective in both the National Conditions and the Law Society's) has been drastically revised and improved. But the new edition (*b*) is noteworthy by reason of two innovations which reflect the changing conditions of modern practice: first, it covers the case of a "sale" (*e.g.*, of a flat) carried out by way of a grant of a lease; secondly, it covers a sale conditional upon a mortgage to the purchaser being forthcoming.

Sale By Way of Lease

Contracts to grant leases were before the war comparatively rare and, as a result, most of the law on what title a lessee is entitled to see was academic. The terms of the lease were agreed and the lease granted and the lessee knew nothing about the lessor's title. Even in the case of a long lease granted by a builder at a premium, often he first granted the lease to a nominee and then sold the lease, showing no title. Contracts for leases are today more common, particularly in the case of sales of flats. There is a growing insistence on seeing the lessor's title and less resistance to deducing it. After all, in the case of registered land there is little trouble to the lessor and he has got to co-operate with the lessee to a certain extent to enable the lease to be registered. Indeed, a lessee who has never seen his lessor's title can sometimes be registered with absolute title (*c*). Where underleases are being granted there is a growing insistence on seeing the headlease and, again, lessening resistance to producing it. (For those worried about their costs it must be remembered that the scale fee does not cover deducing or investigating the lessor's title.)

(*a*) Vol. 17, p. 480.
(*b*) 17th ed.
(*c*) Curtis and Ruoff's *Registered Conveyancing*, p. 812.

The new Conditions divide the particulars into the property and the interest sold, so that where the sale is by way of the grant of a lease this may be stated. Then special condition F states: "Title shall be deduced, and shall commence as follows." This will bring general condition 19 (1) into operation, which provides for the lease and counterpart to be prepared by the vendor's solicitor. Naturally, the form of lease must be agreed upon before the contract is signed. Nothing is said about costs, so that the Costs of Leases Act, 1958, applies unless some special provision is inserted. Today, in this type of case the lessee rarely agrees to pay the scale fee, though he sometimes agrees to make some contribution to cover the additional work on the lessor's solicitors, or at least to agree to engross the counterpart.

Sale Conditional on Mortgage

In the notes to the form a clause is suggested (*d*) to cover the case when part of the purchase money is to be provided by a mortgage, and this will operate clause 9, which provides that, if the proposed mortgagee declines (except solely on the ground of an objection which the vendor is prepared to remove) to make the advance, the purchaser may rescind and get back his deposit. We suggest that condition K is not sufficiently precise: the purchaser should be required to take proper steps to secure the mortgage, for, otherwise, in the case of an unscrupulous purchaser he really gets an option to purchase. We would suggest something like the following: "The purchase is made on the footing that the purchase money will be provided with the aid of an advance of a sum of £—— from ——. The purchaser shall take all necessary and reasonable steps with all reasonable dispatch to apply for an offer of an advance of the said sum and shall comply with all reasonable requirements of the said ——. Subject as aforesaid, Condition 9 of the National Conditions of Sale shall apply accordingly." At any rate, this should prevent the purchaser playing fast and loose.

Completion

It will be remembered that as far back as 1950 (*Pedigree Stock Farm Developments* v. *R. Wheeler & Co., Ltd.* (*e*)) it was decided that if a vendor wished after contract to make time of the essence *either* he had to wait until the purchaser had been guilty of unreasonable delay and then serve him with a notice giving him reasonably sufficient time *or* he had to serve a notice under an

(*d*) Special condition K.
(*e*) (1950) 155 E.G. 66.

express term of the contract enabling him to make time of the essence. Neither draftsman of the 1953 editions of the Law Society's Conditions and the National Conditions took heed of this decision, and the unsatisfactory position remained: *Re Engall's Agreement* (*f*); *Re Barr's Contract* (*g*). This last decision was particularly unsatisfactory, for the learned judge held that the practical problem of raising money must be considered as well as conveyancing matters, though why a vendor should be concerned with the purchaser's problems of finance it seems difficult to see.

Be that as it may, if conveyancing is to be carried out smoothly and without undue hardship to either party, it is essential that where there is delay a notice can be served in the knowledge that it is effective. This involves (i) that the notice can be served on a determinable day and (ii) that the period of the notice can be specified with certainty. The new condition 22 appears to cover these two requirements. (i) Either party can serve the notice—this is one improvement; generally only the vendor's right is dealt with. (ii) The notice may be served on or after the completion date. (iii) The notice will require completion of the contract in conformity with the condition, *i.e.*, within twenty-eight days after service of the notice, time being of the essence. (iv) The notice may be served on the other side or his solicitor.

Miscellaneous

Apportionments and interest

The conditions dealing with these matters have been revised and improved. The sound general principle is clearly stated that a vendor cannot have both interest and the income from the property, but he is no longer obliged to allow the purchaser a fair rent equivalent if he retains or withholds possession. It is now clearly stated that annual sums are to be apportioned on an annual basis. This is not quite so easy as might be supposed. If a lease is granted on April 1 for a term from then until June 24 and then for twenty-one years, the rent being payable on the usual quarter days and a subsequent sale takes place on October 1, is the year of the lease to be taken as from April 1 or June 24? Different results may well be obtained in different cases, depending on the date from which a lease is taken as running.

Tax allowance

Condition 20, which was omitted from the last edition is restored in a revised form. It provides that the vendor will either give

(*f*) [1953] 1 W.L.R. 977.
(*g*) [1956] 1 W.L.R. 918.

particulars of capital expenditure or maintenance or an authority to the Inspector of Taxes to make the information available.

Resale

Dr. Walford suggested in his comments on the last edition that loss on resale should not be limited to resale by public auction. This point has now been met.

Restrictive covenants and priority notices

Condition 19 (4) provides that where a conveyance is to contain restrictive covenants and the purchaser intends to mortgage the property, he shall give notice to the vendor of his intention and allow the vendor to give a priority notice "at least fourteen days before the contract is completed." This should read "fourteen working days."

Conclusion

This edition is a considerable improvement on the last one. As will have been seen, the revisions are not merely verbal revisions to justify a new edition but either break new ground or remove blemishes.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Ackroyd and Sons v. *Hasan* [1959] 1 W.L.R. 706; [1959] 2 All E.R. 370 (Q.B.D.)

Estate agent—commission—" prepared to enter into a contract "—need for actual contract.—Once again estate agents have failed to secure commission where a purchaser has been introduced but no actual contract of sale has been entered into. The relevant term in the contract between vendor and agent here was as follows: " We should take this opportunity of confirming that in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission." Purchasers willing to contract on the terms communicated by the vendor to the agent were found, but just before exchange of contracts the vendor altered her terms and negotiations broke down. Winn J., " constrained by the philosophy " of the recent cases, held that " prepared to enter into a contract " means " does enter into a contract " (referring specifically to *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108 and *Peter Long and Partners* v. *Burns* [1956] 1 W.L.R. 1083, and distinguishing *Trinder (John E.) and Partners* v. *Hagges* [1951] W.N. 416). The learned judge also held that there had been no assent by the plaintiff within the terms of the paragraph quoted above.

Diwell v. *Farnes* [1959] 1 W.L.R. 624; [1959] 2 All E.R. 379 (C.A.)

Husband and mistress—joint home—beneficial interests arising—equitable principles applicable.—In 1945 a husband, as tenant, took his mistress, the defendant, to live in No. 13, expenses including rent being shared as both were working. In 1954 the husband purchased No. 13 cheaply as sitting tenant with the aid of a mortgage, on which the defendant made sixteen monthly repayments. In 1956 No. 13 was sold at a substantial profit and No. 15 purchased. At this time the husband wrote of " our sale " and " our expenses." The defendant paid only one of the mortgage instalments on No. 15 but put in a water-heater. No. 15 was now clear of debt by reason of an insurance policy taken out to discharge the mortgage. The plaintiff, the husband's wife and administratrix, now sought possession and the defendant counterclaimed for a half beneficial share. The county court judge found for the defendant, applying the maxim " equity delighteth in equality."

The Court of Appeal (Hodson, Ormerod and Willmer L.JJ.) now held by a majority (Willmer L.J. dissenting) that the defendant was entitled to a beneficial share but not a half-share. A number of points were taken.

(1) The maxim "equity delighteth in equality" is not limited to disputes between husband and wife (*Silver* v. *Silver* [1958] 1 W.L.R. 259; *Re Dickens* [1935] Ch. 267) though of course more easily applied in such cases.

(2) The rights of a husband and mistress must be decided on the basis that they were strangers, *per* Hodson and Ormerod L.JJ. On this point Willmer L.J. conceded that the law of husband and wife was not of direct authority, but was readier than his colleagues to apply it by analogy.

(3) Payment of rent by the defendant was irrelevant to her claim on capital—again *per* Hodson and Ormerod L.JJ. This was the chief point of Willmer L.J.'s dissent, for by taking these payments into account he was able to find a joint enterprise existing from the beginning.

(4) The defendant was a contributor to the purchase of the two houses, and entitled to more than a charge for what she spent. The majority of the court held that she was entitled to an equitable interest limited to the proportion which her payment bore to the purchase price. Here Willmer L.J. would have upheld the county court decision.

It will be seen that the difference between Hodson and Ormerod L.JJ. on the one hand and Willmer L.J. on the other turned principally on the question whether, on the facts, a joint enterprise from the beginning should be inferred. It seems to have been his finding on this point which caused Willmer L.J. to turn to the cases on husband and wife. Consequently it would seem that the maxim "equity delighteth in equality" can be more readily invoked by a wife than a mistress, or any other stranger, because a wife can more readily establish a joint enterprise (see *Silver* v. *Silver, supra*).

R. and T. Glynn Evans and others v. *Liverpool Corporation*
[1959] 2 W.L.R. 749; [1959] 2 All E.R. 419 (Q.B.D.)

Highway—making up of street—abandonment and new proposal—Private Street Works Act, 1892.—Under the Private Street Works Act, 1892, s. 6, an urban authority may "from time to time resolve to make up the street and charge the frontagers"; provision is made for publication and service on the frontagers of the proposals and objections may be lodged within one month; thereafter the authority may apply to a court of summary jurisdiction for determination of such objections (s. 8). Amendments to a scheme may be made under section 11 of the Act, and there must be similar service and opportunity to object (though only on restricted grounds).

In 1931 the Liverpool Corporation resolved to make up a street, the formalities were complied with, and objections lodged. Nothing more was done. In 1948 a fresh resolution was passed and again

nothing done after objections. In 1952 the estimates under the 1948 resolution were revised under section 11, and objections lodged.

These came before a court of summary jurisdiction in 1958, when the magistrate held the objections failed. The present appeal was by way of case stated.

The Divisional Court (Lord Parker C.J., Donovan and Salmon JJ.) dismissed the appeal. It was held that (1) the 1892 Act permits the abandonment of a scheme without reference to a court and the subsequent formulation of a new scheme; if it did not, much of the point of allowing objections would be lost; (2) on the facts, the 1931 resolutions had been abandoned by 1948, so the 1948 resolution was valid; (3) the appellants could not complain of hardship and increased cost caused by delay, for their own objections, which were technical, contributed to the postponement, and it had been conceded before the magistrates that the road ought to be made up.

Scottish Co-operative Wholesale Society, Ltd. and others v. *Ulster Farmers Mart Co., Ltd.* [1959] 2 W.L.R. 857; [1959] 2 All E.R. 486 (H.L. (N.I.))

Market—franchise—disturbance—rival market and trading.—At common law a market is a franchise—an incorporeal hereditament—conferring a right to hold a concourse of buyers and sellers to dispose of the commodities in respect of which the franchise is given and to charge tolls. (See *Marquis of Downshire* v. *O'Brien* (1887) 19 L.R.Ir. 380 at p. 390, *per* Chatterton V.-C., adopted in Halsbury's *Laws of England*, 3rd ed., Vol. 25, at p. 381.) Interference with such a franchise gives rise to an action of tort and takes two principal forms—levying a rival market and actual disturbance.

In the present case the facts were somewhat complicated, but in essence the respondents claimed a declaration and damages on the ground that their franchise of market in (*inter alia*) dead and live pigs had been killed by a scheme whereby the Minister and Ministry of Agriculture in Northern Ireland (also appellants) had invited producers to send or bring their pigs to the Co-operative Society's abattoir, offering cheap transport as an inducement. The House of Lords (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow) held there was no cause of action, reversing the decision of the Court of Appeal in Northern Ireland (Lord MacDermott C.J., Black L.J. and Sheil J.).

The decision rested on two grounds. First, it was held that the Ministry's scheme involved no "concourse," even of sellers alone, because each pig producer sent or brought his pigs under individual arrangements. Consequently there was no rival market, for such a concourse is an essential feature of any form of market (citing, *inter alia*, *Great Eastern Ry.* v. *Goldsmid* (1884) 9 App.Cas. 927 and *London Corporation* v. *Lyons, Son & Co. (Fruit Brokers), Ltd.* [1936] Ch. 78). Secondly, there was no disturbance of the respondents' rights, for "a sale outside the market which has, or may have, the effect of depriving the market owner of toll or some other advantage is an actionable disturbance only if the person selling takes or seeks

to take the benefit of the market" (*per* Viscount Simonds [1959] 2 W.L.R. at p. 862; [1959] 2 All E.R. at p. 591). This, it was held by all their Lordships (except Lord Keith, who did not deal with the point), had not happened. The Ministry and the Society had merely traded near-by as any individual might do, and had done so irrespective of the existence of the market.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Brown v. *Brown* [1959] 2 W.L.R. 776; [1959] 2 All E.R. 266 (C.A.)

Variation of settlement—conveyance to husband and wife as joint tenants—definition of settlement—Matrimonial Causes Act, 1950, *s.* 25.—This is a decision of some importance which is best considered against the background of recent precedent.

In *Smith* v. *Smith* [1945] 1 All E.R. 584 a house, purchased with the husband's money, was conveyed to husband and wife expressly as joint tenants on trust for sale and upon trust to hold the proceeds and net rents and profits until sale for themselves as joint tenants beneficially. Denning J. (as he then was) held that this transaction constituted a "settlement" which could be varied under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192 (now replaced by the Matrimonial Causes Act, 1950, s. 25) and in the course of his judgment said "The result was that the husband and wife held a joint tenancy of the legal estate in the land (which could not be severed) and an equitable joint tenancy in the income of the land pending sale and of the proceeds eventually arising from the sale (which could be severed by taking the appropriate steps). So long as husband and wife were living together in the house, they, of course, shared the occupation and acquiesced in a postponement of sale, and if they had continued in that way until one died, the survivor would take the whole legal and beneficial interest in it. If they together let or sold the house, either of them could sever the equitable joint tenancy in the income or proceeds whereupon each would be entitled to one-half. No letting or sale could, however, be effected by one without the consent of the other, except by order of the Court of Chancery, which would consider whether in the particular circumstances it was right and proper that such an order should be made." Denning J. went on to say that any matrimonial provision, even a complete transfer, could also constitute continuing provision and so a variable settlement. The reasoning in *Smith* v. *Smith* was applied in *Halpern* v. *Halpern* [1951] P. 204, where the wife conveyed to her husband a half-share in a house (not the matrimonial home) which she owned, though the judgment does not show whether they were expressly stated to be joint tenants or remained tenants in common as would prima facie be the case.

These two decisions and other earlier ones were reviewed by the Court of Appeal in *Prescott (orse. Fellowes)* v. *Fellowes* [1958] P. 260 (noted *ante*, Vol. 22, at pp. 389, 390) where an outright gift by a wife to her husband was held not to be a settlement within the Matrimonial Causes Act, 1950, s. 25, on the ground that there must be some sort of continuing provision to found jurisdiction. Hodson L.J. cited and criticised that part of Denning J.'s judgment (not cited in this note) in *Smith* v. *Smith* which defined a continuing provision and after mentioning *Halpern* v. *Halpern* said " but I confess that in my opinion it appears that both those cases went beyond the latitude which the authorities have conferred in the liberal interpretation of the words ' property settled ' in the section " ([1958] P. at p. 280). Romer L.J. said ([1958] P. at p. 286): " In my opinion the decisions in *Smith* v. *Smith* and *Halpern* v. *Halpern* go further than is warranted by the decision of this court in *Hubbard* v. *Hubbard* " (reported at [1901] P. 157). Both Lords Justices, it will be observed, were apparently referring to the decisions rather than to dicta in the two earlier cases under discussion. Sellers L.J. concurred with both judgments. In the note on *Prescott (orse. Fellowes)* v. *Fellowes* it was submitted that the result was that neither joint tenancy nor tenancy in common created a variable settlement, and that this was consonant with the decisions under the Married Women's Property Act, 1882, s. 17 (see *ante*, Vol. 22, at p. 390).

In the present case, however, the Court of Appeal (Hodson, Sellers and Willmer L.JJ.) have taken a different view in a considered judgment of the court delivered by Hodson L.J. The matrimonial home here was expressly conveyed to husband and wife on trust for sale and to hold the proceeds or net profits upon trust for themselves as joint tenants. The purchase-money was provided by both parties and by borrowing, and both parties had contributed to partial payment off. Hodson L.J., after referring to *Hubbard* v. *Hubbard, supra,* and *Prescott (orse. Fellowes)* v. *Fellowes,* discussed *Smith* v. *Smith*. He said the actual decision there was not in point in *Prescott,* because of the difference in facts, cited as correct the passage quoted above from the judgment of Denning J., remarked that there had been no severance in equity and continued: " Without therefore resorting to the liberal construction of the word ' settlement,' which has been so much discussed in the authorities, it is in our judgment right to regard the conveyance here in question as a settlement by the parties on themselves as trustees, which by its terms created legal and beneficial interests such as to give it the attributes of a settlement. We respectfully agree, therefore, with that part of the judgment of Denning J. which deals solely with the instrument under his consideration " ([1959] 2 W.L.R. at p. 780; [1959] 2 All E.R. at p. 269).

With respect, the Court of Appeal does seem to have altered course. It is now the passages quoted from *Prescott (orse Fellowes)* v. *Fellowes* that go too far rather than the decisions in *Smith* v. *Smith* and *Halpern* v. *Halpern*. Yet the exact basis and effect of the present decision seems uncertain. It is only joint tenancy that is a continuing provision, because of the continuing possibility of either severance or the operation of the *jus accrescendi*? Will there still be a variable settlement if the beneficial interest is held in common with precisely defined shares? Is it only an *express* trust for sale and declaration of

beneficial interest that makes a settlement, or will the result be the same if the conveyance is just made to husband and wife so that a statutory trust for sale operates? Do *Prescott* and *Brown* constitute inconsistent decisions of the Court of Appeal, between which a later court can choose? (See *Young* v. *Bristol Aeroplane Company* [1944] K.B. 718.) All the above questions are, it is submitted, arguable. Moreover, they may have to be argued, for as the cases show, it is often to the interest of one spouse to oppose exercise of the jurisdiction under the Matrimonial Causes Act, 1950, s. 25.

Re Poole's Settlement Trusts [1959] 1 W.L.R. 651; [1959] 2 All E.R. 340 (Ch.D.)

Variation of settlement—effect of extinguishment of spouse's rights —meaning of survivorship. Variation of protective trusts under Variation of Trusts Act, 1958, *s.* 1.—This case, like *Re Allsopp's Settlement Trusts* [1959] 1 Ch. 81 (noted *ante,* Vol. 22, p. 302) turned on the effect of an order of the Divorce Court varying two post-nuptial settlements by declaring that all the wife's "rights powers and interests . . . be extinguished absolutely as if she were now dead." Under the settlements the husband was entitled to the whole income on protective trusts if he survived the wife, and to exercise, as survivor, a power of appointment taking effect on the cessation by death of a prior joint power. Roxburgh J. criticised the form of the order but held, following *Whitton* v. *Whitton* [1901] P. 348, that the wife should be deemed dead so as to bring the "survivor" provisions into effect. The husband, who had not forfeited his life interest under the protective trust, appointed one moiety of the trust funds irrevocably to his son, the only child of the marriage, and application was now made under the Variation of Trusts Act, 1958, s. 1, to enable the husband and son to divide the moiety. It was first proposed to make provision of £1,000 (out of some £20,000) for the son's only existing child, but Roxburgh J. would not approve the variation until possible future children were also provided for. The relevant clause was therefore amended so that all the son's children should share in £1,250, and this was approved.

Green v. *Russell* [1959] 3 W.L.R. 17; [1959] 2 All E.R. 525 (C.A.)

Implied trust—whether arising out of contract—insurance.—The Court of Appeal (Hodson, Romer and Pearce L.JJ.) has affirmed that decision of Ashworth J., noted *ante,* Vol. 22, at p. 466, where the facts are given. On the construction of the Fatal Accidents (Damages) Act, 1908, there was some difference of reasoning though not in conclusion. On the more general point the Court of Appeal agreed, first, that no trust for employees could be upheld from the facts of the case, and second that there was no common law right to sue in contract. As judgment was reserved the decision is a strong affirmation that trusts and contracts are separate legal conceptions which will not

readily be found to trespass in each other's domain (see also on the contract point *Midland Silicones, Ltd.* v. *Scruttons, Ltd.* [1959] 2 W.L.R. 761; [1959] 2 All E.R. 289).

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3. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Granada Theatres, Ltd. v. *Freehold Investment (Leytonstone), Ltd.* [1959] 1 W.L.R. 570; [1959] 2 All E.R. 176 (C.A.)

Repairs—" structural repairs of a substantial nature "—meaning—notice to landlords of disrepair—delay by landlords—refusal by landlords to specify proposed repairs—landlords' workmen prevented from doing repairs—repairs done by tenants—liability of landlords—breaches by original tenant of repairing covenants — liability of assignees.—The Court of Appeal has affirmed the decision of Vaisey J. (noted at Vol. 22, p. 392) in so far as he decided that the repairs in this case were " structural repairs of a substantial nature." It was argued, however, that the tenants were precluded from recovering damages in respect of the landlords' failure to do these repairs, since the landlords had always been ready and willing to do them, and would indeed have done them had they not been denied access to the premises by the tenants. The tenants had in fact ordered the landlords' builder off the premises, but only after the landlords had refused, after a very long delay, to provide the tenants with a detailed specification of the repairs proposed by the landlords, which, judging from the estimate obtained from the landlords' builder, the tenants considered inadequate. The tenants then carried out repairs themselves and claimed the cost of those repairs from the landlords; and the question arose whether, on the assumption that the repairs proposed by the landlords would have been a sufficient performance of the landlords' covenant, the tenants had by their conduct put an end to their cause of action. Upon this point opinions differed. Jenkins L.J. (dissenting) was in favour of the tenants on the ground that the landlords had been guilty of inordinate delay and undue reticence as to their intentions, so that the tenants' conduct was justified. Romer and Ormerod L.JJ., on the other hand, held on the facts that the landlords had shown themselves ready and willing to do the work and that they had given the tenants a sufficient general indication of its nature, more than which the tenants were not entitled to demand.

One further point arose upon which the court was unanimous. The landlords contended that the structural disrepair complained of was due to successive breaches of covenant by the predecessors in title of the tenants, for which the present tenants (as assignees) were responsible, so that the landlords had a claim against the tenants, which would cancel out the claim of the tenants against the landlords. It was held, however, that an assignee of a tenant, though liable for

the state of the premises when he takes over in so far as their then state of repair falls within the scope of the tenant's repairing covenants, is not liable for particular breaches of covenant committed by his predecessors. In the present case the tenants' schedule of dilapidations was served so soon after the lease had been assigned to them that none of the items of disrepair could have been attributable to the tenants personally.

Bolton's (House Furnishers), Ltd. v. *Oppenheim*
[1959] 1 W.L.R. 685; [1959] 2 All E.R. 473 (Ch.D.)

Landlord and Tenant Act, 1954—business premises—notice to terminate tenancy—intention to demolish premises—form of notice—preliminary point of law.—In a notice to terminate a tenancy of business premises served under section 25 (1) of the Landlord and Tenant Act, 1954, the landlord stated that he would oppose an application for a new tenancy on the ground that he intended to demolish the premises comprised in the holding and carry out substantial work of reconstruction on the holding: but he did not go on to state that he could not reasonably do this work without obtaining possession of the holding (see s. 30 (1) (f) of the Act). Danckwerts J. felt compelled by the decision of the Court of Appeal in *Biles* v. *Caesar* [1957] 1 W.L.R. 156 (noted at Vol. 21, p. 169) to hold that the landlord's ground of opposition had been fairly stated, even though an essential condition to the recovery of possession under section 30 (1) (f) had not been expressly set out, since the paragraph of section 30 (1) upon which the landlord relied, had been quite clearly specified.

Danckwerts J. also directed that when a preliminary point of law of this nature is raised, a *pro forma* summons should be taken out in the proceedings started by originating summons under the Act asking for a declaration on the point which the parties desire to have decided.

Clifford Sabey (Contractors), Ltd. v. *Long* [1959] 3 W.L.R. 59; [1959] 2 All E.R. 462 (C.A.)

Landlord and Tenant (Temporary Provisions) Act, 1958—suspension of execution of order for possession—offer of new tenancy by landlords—refusal of offer by tenants—reasonableness of refusal.—Section 3 (1) of the Landlord and Tenant (Temporary Provisions) Act, 1958, provides that the court may suspend the execution of an order for possession of premises decontrolled by the Rent Act, 1957, if the occupier satisfies the court *inter alia*: "(a) that he has not unreasonably refused or failed to accept any proposal made by the owner for the grant of a new tenancy of the premises or part of the premises, being a tenancy for a term of not less than three years and not being a tenancy to be granted at a premium or requiring the payment of increased rent in respect of any period before the date on which the proposal was made." In a notice to terminate a statutory

tenancy of decontrolled premises the landlords in this case offered a new tenancy for five years, the offer to be accepted within one month. The terms of the new tenancy with regard to rent and repairs were found to be reasonable (see Act of 1958, s. 3 (3)). But the offer was not accepted within the time limit, mainly because the first defendant (one of the tenants) felt that as a result of the political agitation produced by the passing of the Rent Act, 1957, there was a good chance that the law would be altered in favour of tenants. Lord Evershed M.R. (with whom Ormerod and Willmer L.JJ. agreed) declined to lay it down that no circumstances existing at the relevant time (*i.e.*, the date of the refusal of the offer), which could properly be comprehended by the formula " political prospects," would be relevant to a consideration whether an offer had been unreasonably refused. If, for example, it were proved that amending legislation were pending or even probable, which legislation would be likely to affect later similar agreements, a court might well, in his view, not hold it unreasonable for a tenant " to decline to bind himself and to play for time." But " it is not relevant for the court to take into account the mere possibility of some change of legislation in the near or foreseeable future." The " political prospects " in the present case were not relevant, since they amounted at most to political agitation. Upon the facts of this case, therefore, the offer of a new tenancy had been unreasonably rejected, and suspension of the execution of the order for possession was refused.

THE LIBRARY

Third Supplement to Dymond's Death Duties, 12th ed. By Robert Dymond and Reginald K. Johns. London: The Solicitors' Law Stationery Society Ltd. xix and 182 pp. (21s.)

Despite the succinct manner in which the authors have once again reduced the legislature's efforts at patching the complex quilt of estate duty legislation, the Third Supplement to Dymond has now reached the proportions of a book with corresponding expense. This indispensable part of any conscientious practitioner's library reduces the almost incredible complexity of the latest Finance Act to readable English and congratulations must be extended on the appearance of frank admissions that certain provisions are so obscure that their meaning cannot be forecast without considerable hesitation.

Section 28 of the Finance Act, 1958, designed to ensure that a supposed "loophole" (the purchase by the life tenant of the reversion and like transactions) should be less efficacious in reducing the wealth of the Exchequer, is faithfully dealt with: numerous examples illustrate the point where clear, and stimulate thought where the Act remains a mystery. Suitable surprise is expressed at the effect of these provisions, but the conclusion (at p. 26) that a life tenant should not pay for the reversion a purchase price which together with the prospective duty on that price would exceed the value of the reversion seems too cautious. The duty must surely be discounted by reason of its potential disappearance after five years.

Examples again greatly increase the value of the summary of the new quick succession relief provisions; the remainder of the Finance Act is duly given appropriate comment. Such decisions of the courts as there have been since the last supplement are recorded in due place—in particular *Potter* v. *C. I. R.* 1958 S.L.T. 198 is usefully considered on the question of aggregation as well as under "subject-matter of gifts."

A new edition will undoubtedly be with us shortly; it is indicated in the preface that the promised legislation on policies of assurance formed a strong factor for producing a supplement rather than a 13th edition. The appearance of yet another extra-statutory concession following *Re Hodge's Policy* [1958] Ch. 239 and the prospect of an election render the early event of such legislation a matter for doubt. Obviously no one will refrain from buying this supplement whilst awaiting the new edition; good sales should therefore not lead those concerned to think that a new edition would not be welcomed. To bring about a modest size could we not have two volumes, the statutes, orders, etc., being bound separately with their own index? Finally, the cross references from the text of the statutes to the comment is sadly lacking in the main work and would be of greater value than the index itself.

D. R. S.

Income Tax Law and Practice. By Cecil A. Newport, F.A.C.C.A., Fellow of the Institute of Taxation, and H. G. S. Plunkett, Barrister-at-Law, formerly one of H.M. Inspectors of Taxes. 28th ed. London: Sweet & Maxwell Ltd. xli and 464 pp. (£1 10s.)

Two of the most turgid Finance Acts for many years have been tackled by the authors with the zest usually expected of this work. No student unqualified or practitioner can be otherwise than grateful for this potted version

of the enormous realm of the law relating to income tax. The rate of growth of the subject, shown for example by a new chapter on overseas trade corporations, places a heavy burden on anyone expressing himself in print on but a small section of the law, let alone its entirety. When growth is coupled with obscurity, as seems to be the modern legislative trend, summarising in a volume is a major work of condensation after the task of comprehension is completed. The speed with which a new edition appears, valuable in content, at a modest price and clearly printed, brings credit to all concerned.

In a work of this nature it is easy to suggest that some subject might receive fuller treatment, though difficult to suggest space saving. Particularly noticeable in this respect is the very brief account of the complex provisions relating to family settlements. Space might perhaps be saved by the relegation of cases to footnotes (when a rather larger number might be included) instead of the majority being set out in the text itself. Any saving might also be utilised in adding to the neat survey of "surtax directions" a note as to the "horse deals" contracted by the Commissioners when application for a "clearance" is not wholly successful. Such a case, where law and practice tend to divide, is one where comment on the unpublished practice would immensely increase the value of the book.

So much has rarely been written in such a short space to such good effect. It is an essential handy work of reference—as such, however, it needs more cases to facilitate the following up of the lead gained from its pages.

D. R. S.

Fourth Cumulative Supplement to Woodfall's Law of Landlord and Tenant. By JOHN CLARK, B.A., Barrister-at-Law. Sweet & Maxwell, Ltd. (8s. 6d. net.)

This Supplement brings the law as stated in the 25th edition of *Woodfall* and the two Permanent Supplements up to April 1, 1959. Supplements are a necessary part of the machinery of standard textbooks in these days of fairly constant change in the law and this fresh accretion to *Woodfall* is, therefore, to be welcomed. In general the work of keeping *Woodfall* up to date (no light task) has been faithfully done. There are, perhaps, a few deficiencies in such a specialised field as agricultural holdings. The note to paragraph 976 in the main work should refer to section 2 of the Agriculture Act, 1958. The procedure referred to in the note to paragraph 1746 is now superseded. The reference in the note to paragraph 2261 to reg. 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948, No. 190), should now be to Article 6 of the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81), and the tenant no longer has the option of challenging a reason stated in the notice to quit in court proceedings. The Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954 (S.I. 1954, No. 1138), is still printed as if it were the operative Order. In fact, except for the very unlikely purpose of references under section 85 or 86 of the Agriculture Act, 1957, this Order has been superseded by the Agricultural Land Tribunals Rules, 1959, printed in the Schedule to the 1959 Order cited above.

Not all the references to the Housing Act, 1957 (which consolidated the previous law), appear to have been picked up. For example, there should be a note to paragraph 1861 in the main work directing the reader now to section 162 of the 1957 Act (power of court to determine or vary lease).

J. M. W.

Gale on Easements. 13th ed. By MICHAEL BOWLES, Barrister-at-Law. Sweet & Maxwell, Ltd. li and 426 pp. (£4 10s.)

Another edition of *Gale* within nine years is certainly a welcome event, and one of importance to conveyancers, although the gap is no less than that

between previous editions, except between the eleventh and the twelfth. This time the book has been almost completely re-cast—it is now a textbook on the subject, and no longer, as Mr. Bowles rightly says in his preface, "a series of essays . . . full of extracts from then recent judgments." The whole of the subject-matter of this difficult branch of our case law—almost entirely free from statutory interference—has been digested, and is dealt with in an authoritative and orderly narrative. The arrangement of the chapters is much as it was in previous editions, and so is a considerable portion of the text on "particular easements," but the first two Parts, "Easements Generally," and "The Acquisition of Easements," would probably not be recognised by the original author. This is not to say the new edition is any the worse for that; the last edition to be written by Gale himself appeared over 100 years ago, and since then there have been many developments in the law; the book is now a useful practitioner's tool, with enough discussion of principle and citation of authority to satisfy any more academic reader, although we would have welcomed more references to articles in this and other learned periodicals.

Your reviewer found particularly interesting the learned editor's analysis of the characteristics of an easement, based naturally on *Re Ellenborough Park* [1956] Ch. 131, and his classification into "positive rights" and "negative rights" of the owner of the dominant tenement; his proposition that the right to do *any* positive thing can be the subject-matter of a grant is clearly sound, and therefore it is well established that the list of positive easements recognised by the law is not complete—and perhaps in the nature of things never can be. However, on p. 21, it is also argued that "the class of negative easements is now closed." If this is so—and there does not appear to be any clear authority establishing the point, although it seems sound in principle—it would settle the question, in the negative, as to whether there is an easement of "weatherproofing," capable of being enjoyed for the benefit of premises left standing, with what was formerly a party wall bare to the elements, after the demolition of the "servient tenement" adjoining. When this question comes before the courts—as one would think must happen before long—there will be an opportunity of confirming (or confuting) Mr. Bowles's forceful reasoning.

We were not able on a first, but careful, reading to detect any misprints, except that the quotation marks commencing in the third paragraph on page 34 have not been closed. *Abingdon* v. *James* [1940] Ch. 287 (on p. 39) turns on the statutory powers of a local authority as water undertakers, and is not really an "easements" case at all. This raises the whole question of the nature of the rights owned by public utility undertakings over private land; are the rights given by their several enabling statutes to lay mains and services, etc., and thereafter to maintain them, "easements" *stricto sensu*, are they "rights" in, on or over land within section 1 (2) of the Law of Property Act, 1925, so as to be capable of subsisting as legal interests in land, or are they *sui generis*? This subject may have been regarded as outside the scope of *Gale*, but we would have welcomed the learned editor's views on this and related problems of the control over land use exercised by public agencies.

The present edition follows its predecessors in matters of physical arrangement, except that the side-notes at the top of each page have been dropped. On most pages this does not matter, but where long extracts from judgments run over several pages (although there are not as many of these as there were in former editions: see, *e.g.*, pp. 105–109, 196–200 and 245–248), these side-notes served a useful purpose when finding one's way about the book in a hurry. We are very glad to see the book has at last been equipped with a full apparatus of case references in the index, and also that this edition is so up to date that the learned editor has been able to include a useful paragraph (p. 133) on the Rights of Light Bill (as it then was).

The book is well produced, and although it is considerably shorter than the twelfth edition (partly due to the most welcome excision of extracts from

Gaius and Justinian—and even Pothier), the new edition costs more. The price is nevertheless still modest for the present day, and is well worth paying.

J. F. G.

Jackson and Muir Watt on Agricultural Holdings. 11th ed. By J. Muir Watt, M.A. With a Manual of Tenant Right Valuation by D. H. Chapman, A.R.I.C.S., Q.A.L.A.S. London: Sweet & Maxwell, Ltd. xl, 557 and (index) 11 pp. (£2 15s. net.)

A most hearty welcome will be given by lawyers and land agents to this new edition of the familiar *Jackson*. I have before me a copy of the sixth edition, published in 1924 and containing 392 pages. Unfortunately this happens to be the second edition prepared by the late Mr. Hanbury Aggs, and his Preface contains no reference to Mr. T. C. Jackson, although the Preface by the latter to the first edition is reprinted. This eleventh edition is the first entirely edited by Mr. Muir Watt, and, as he says in his Preface, he has rewritten the last edition (the tenth), published (in 1949) by Mr. Hanbury Aggs. The number of pages has now increased to 570, with a pamphlet giving the text of an important Order revising the statutory forms in connection with applications to the Agricultural Land Tribunal regarding provision of fixed equipment, which came out too late for printing in the book. The increase in the number of pages speaks for itself. Mr. Hanbury Aggs wrote in 1924: "the pitfalls that lie open for the unwary tenant and landlord, as well as valuers, who have such important duties entrusted to them, are frequent and varied." Looking back, the 1923 Act seems like the simple mechanism of the old Morris Cowley compared to the complicated machinery of its modern counterpart. No specialist in this complicated branch of law would think for a moment of being without a complete guide to the Acts and the statutory instruments of which they are so productive. It follows that the use of some such textbook as *Jackson* is absolutely essential to anyone who only occasionally has to advise on the Acts now in force, including the Agricultural Holdings Act, 1958, which has made some very far-reaching changes, particularly in regard to the Tribunals originally set up by the 1948 Act. A discussion of these changes is naturally what one first turns to in the new edition, followed by a perusal of what the author has to say on various important cases. In both respects Mr. Muir Watt succeeds admirably. One could perhaps have wished him to comment more speculatively on how the famous discretion of the Tribunal in regard to consents to Notices to Quit, as altered by the 1958 Act, is likely to work in practice, with its new formula of the "fair and reasonable landlord." But that would be to ask our editor to prophesy. Let us hope that this edition sells so quickly that he is able to produce a new one in two or three years time when the Tribunals will have made precedents to go upon.

The general lay-out of the book is sound and follows previous editions. Part I consists of sixteen chapters and 194 pages, comprising a General Statement. This covers most of the important aspects of the relevant law and practice, and is an excellent introduction and general guide. Part II is a modern manual of tenant right valuation written specially by Mr. Derek H. Chapman. So far as a lawyer can dare to comment, this seems most intelligently written, with some nice touches of humour and humanity, and throws helpful light on such mysteries as unexpended manurial values and the like. In Part III follows the relevant legislation with the detailed notes. In general, therefore, one looks up the required point both in Part I and in Part III. The statutory instruments follow in Part IV, and a very comprehensive selection of forms precedes the index, in Part V. The book is, as to be expected these days, pleasantly printed with an appropriate green binding.

J. F. M.

The Law of Agricultural Holdings. 3rd ed. By W. S. Scammell, C.B.E., M.C., LL.B.(Lond.). London: Butterworth & Co., Ltd. xxxiii, 710 and (index) 27 pp. (£2 15s. net.)

Agronomists can hardly complain of lack of attention from our lawgivers. The 1923 Act survived for twenty-four years without major changes, although the shape of the 1948 Act was moulded by emergency legislation called for by wartime stress. Big changes have already been made in the 1948 Act, which have demanded new editions of the standard textbooks. It is a pity that the 1948 Act has not been consolidated with the amending legislation. In effect the author has to do this in presenting the otherwise chaotic result to the reader, and lawyers cannot be too grateful to him for accomplishing this thankless chore. But how about the man in the street or on the farm? Law should be certain. Since 1948 important Acts have been passed in 1954, 1957 and 1958. One can only hope that the consolidating statute is already *en ventre sa mère*!

I hope the editor will not mind if I run on a little longer before coming to *Scammell.* It occurs to me that I ought to declare an interest (not, let me hasten to say, a financial one). I have before me as I write a valued sixth edition of Jackson's *Agricultural Holdings,* being the second edition edited by the late W. Hanbury Aggs. Its flyleaf, I find, is inscribed in Mr. Scammell's handwriting "W. S. Scammell 1925." Even although I was privileged in being articled to him in 1929, and in working closely with him in agricultural matters until 1952, my retention of his book is clearly unjustifiable morally, although I can probably escape harmless under the criminal and civil law. Aggs refers to the chaotic condition of the law which called forth the 1923 Act, and his list of statutes quoted is interesting; at least to the legal historian. It starts with the Statute of Merton in Henry III's reign, under which sheep were privileged from distress if other distrainable chattels of a tenant could be found (perhaps some glass window in a Cotswold church, or East Anglian belfry owes its being to this enactment). Then follow only ten Acts until the Landlord and Tenant Act, 1851, one of the sections of which attempted to amend the unfairness to the tenant of *Elwes* v. *Maw* (1802) 3 East 38 (no right to remove agricultural fixtures). Two of these Acts dealt with distress. Generally it is clear that the rigours of the common law for the tenant farmer were not lifted until agricultural depression in the seventies combined with Victorian law reform to bring about the forerunners of our present legislation; the Agricultural Holdings Acts of 1875 and 1883. Other Acts followed in 1900 and 1906, with an important consolidating and amending Act in 1908. Jackson, in his Preface to his first edition in 1912, refers to a number of textbook writers, most of whose books have now fallen by the wayside. Which brings me at last to Mr. Scammell's new edition. Although a comparative newcomer, not to the field of agricultural law but to writing upon it, one must recognise that Scammell on *Agricultural Holdings* is now a "must" on the shelves of both lawyers and estate agents. Those shelves will almost certainly also contain an equally well-thumbed book, *viz.*, *Jackson* (which has recently been completely rewritten in its eleventh and latest edition by Mr. Muir Watt). Indeed, I would not mind betting that our learned authors often afford each other mutual help on knotty points. I do not intend here to attempt any comparisons, odious as these often are, except to say that both works are excellent, reliable guides to this tortuous legislation, and, as one would expect, each has some item that the other has not got.

The general plan of Mr. Scammell's book is to divide the legislation into the sections in which it fairly naturally falls, *e.g.*, Chapter 5 deals with contracts of tenancy and the early sections of the 1948 Act, while Chapter 6 follows with the various statutory checks on notices to quit, and security of tenure. Each such chapter contains a general introduction followed by the print of the legislation with the notes of the author subsectionally inserted. As he says

in Chapter 1 (headed "General Remarks and Plan of this Book"), the print of the legislation does not slavishly follow the sections as they appear in the Act. This often enables the reader to get the details into better perspective than a straightforward print would do. The reader new to the book should, of course, study this first chapter with care.

As regards the legal interpretation of the important new provisions of the 1958 Act, *e.g.*, the altered principles for the Agricultural Land Tribunal's grant or refusal of consent to a landlord's notice to quit, one can say that the author has by no means been afraid to give an opinion, and he has several very useful pages (264 *et seq.*). He and Mr. Muir Watt (see *Jackson*, p. 59) seem pretty well to agree in the prophecy that the practical effect of the "fair and reasonable landlord" formula may work out much the same as the previous discretion. May I repeat here a previous humble prayer that the Minister will cause to be printed regular reports of important cases decided by these Tribunals, which have such great powers vested in them? This discretion is so very important that the public generally should know what is happening.

Lastly, the book is excellently buttressed with eight appendices, all well calculated to help busy practitioners. For instance, one need not go to the telephone book for the address to which to post that almost out-of-time notice. The addresses of Committees and Tribunals are all given. There is also a full print of the voluminous subordinate legislation (statutory instruments), and a most complete set of forms and precedents, official and otherwise. The book is well printed and contains 738 pages with the index.

J. F. M.

Palmer's Company Law. 20th ed. By CLIVE M. SCHMITTHOFF, Barrister-at-Law, and T. P. E. CURRY, M.A., Barrister-at-Law. Stevens & Sons, Ltd. civ, 1229 and (index) 28 pp. (£6 6s. net.)

Almost the only connection between this edition and previous ones is the name—and a good thing too! Recent editions had fallen between two stools: they were not sufficiently detailed for practitioners and had too much detail for students. Gower's *Modern Company Law* made such a revolutionary approach to the subject as to supersede other books as leading students' books, and to cause other writers to do a great deal of rethinking. Among other things, it released Palmer's *Company Law* for the practitioner, and the editors have taken full advantage of their freedom. The main part is 828 pages long and there is full treatment of the subject in narrative form. The authors—for that is what they are—have done their work well, and some thorough testing of the work shows that they can give guidance on almost any aspect of the subject. Where a decision cannot safely be acted upon as the final word on the subject—for example, *Victor Battery Co., Ltd.* v. *Curry's, Ltd.* [1946] Ch. 242, which decided that a debenture issued by a company as security to assist a purchase of the company's shares is not void—a warning flag usually goes up.

It is not surprising that even a book of this size has some errors and omissions. It is not correct that a company limited by guarantee without a share capital cannot be a private company (p. 20)—at any rate, the Registrar admits the existence of such companies, which is good enough for practitioners. In dealing with exempt private companies we are not told (p. 43) what corporations have been "designated" so as to be permitted to hold debentures without the company losing its privileged status. In fact, most building societies have been designated. The actual "designation" is carried out by a scrap of paper difficult to trace. Incidentally, should not some prominence be given to the fact that an ordinary mortgage of land is a debenture for this purpose?

Where there are two joint liquidators and one resigns, can the other carry on? Pp. 750 and 752 give little guidance. The answer appears to be that the other cannot unless the power was expressly granted on appointment: *Re Metropolitan Bank and Jones* (1876) 2 Ch.D. 366. Alternate directors (who are much more important in practice than writers would lead us to believe) receive scant attention (p. 526). Must his name appear on the company's notepaper? Does it make any difference if he is appointed for one meeting? It is fair to add that little assistance on these points can be obtained from other standard works.

The unreality of our company law is exemplified by such recent decisions as *Re Jon Beaufort (London), Ltd.* [1953] Ch. 131 (before selling coal to a company, first examine its memorandum and then compare it with its letterheads) and *Rama Corporation* v. *Proved Tin Investments* [1952] 2 Q.B. 147 (a person dealing with a company has constructive notice of its memorandum and articles, but cannot rely on this principle unless he in fact searches the company's file). Is the latter decision so firmly grounded—it has not been followed in at least one other jurisdiction—that a warning flag may safely be dispensed with? It is this divorce from common sense and elementary fairness that necessitates the subject being approached critically but not cynically, although there may well be difference of opinion on what aspects of the subject merit editorial reserve. In our opinion the authors have shown considerable ability and discretion in dealing with the more difficult and doubtful points.

The merits of the book are numerous: the subject is approached as a living part of our mercantile law; the book is arranged in a coherent, logical order; it is clearly written and the principles are well illustrated by examples, even down to forms of resolutions of directors, and illuminated by carefully chosen extracts from judgments; the appendices of statutes (the sections of the 1948 Act are cross-referenced to the text), orders, etc., round off the work. The practical approach is underlined by the work of the sub-editors, Mr. W. E. Talbot (practice notes), Mr. J. F. Bateman (accounting) and Mr. Milton Grundy (taxation). Company law considered apart from taxation is just not sense, and we unreservedly welcome Part X (tax law). There is no doubt that this book is an important addition to the small number of authoritative legal textbooks. If a practitioner can only afford one company book, this is the book. A final brickbat and word of praise: a brickbat for the index, a star for the printing and general get-up.

E. F. G.

We have also received:

Bowstead on Agency. 12th ed. By E. J. GRIEW, M.A., LL.B., Barrister-at-Law. Sweet & Maxwell, Ltd. lxxxviii, 311 and (index) 23 pp. (£3 10s. net.)—The standing of this work is undoubted and the publishers have no doubt for this reason made it the seventh volume in their *Common Law Library*. It is sufficient to say that the editor has done his work well. There are no drastic changes, but out-of-date views have been revised. For example, the passage on the liability of agents for foreign principals has been rewritten and the modern view stated. Confirming houses make their appearance. The digest form does not appeal to everyone, and there is still room for an entirely new authoritative work. Until it appears, whether we like it or not, there is no substitute.

The Concise Law of Housing. Supplement. By W. A. WEST. The Estates Gazette, Ltd. (3s.)